93-956
No. _____

Supreme Court, U.S.
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In The Supreme Court Of The United States

OCTOBER TERM, 1993

In re INVESTMENT BANKERS, INC., Debtor.

DAVIS, GILLENWATER & LYNCH; GILBERT K. DAVIS, individually and as a partner of Davis, Gillenwater & Lynch,

Petitioners,

v.

JAMES H. TURNER, Trustee, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

In re: INVESTMENT BANKERS, INC.

Debtor.

No 92-1121

JAMES H. TURNER, Trustee

Plaintiff-Appellee,
v.

DAVIS, GILLENWATER & LYNCH
GILBERT K. DAVIS,
individually and as a partner
of Davis, Gillenwater & Lynch
a partnership

Defendants-Appellants,
and
O'CONNOR & HANNAN, a partnership

Defendant

SECURITIES INVESTOR PROTECTION CORPORATION,

Appellee.

Appeal from the United States
District Court
for the District of Colorado
(D.C. No. 91-C-1474)

M#191132

The appellee/trustee, James H. Turner, was appointed as the trustee for the debtor, Investment Bankers, Inc. ("IBI"), pursuant to a liquidation proceeding commenced under the Securities Investor Protection Act ("SIPA"), 15 U.S.C. § 78 aaa et seq. The trustee subsequently commenced this action in the bankruptcy court against the defendants/appellants, Davis Gillenwater & Lynch and Gilbert K. Davis, to recover payments of $11,858.00 and $25,000.00 that IBI made to appellants immediately prior to the commencement of the liquidation proceedings. We conclude that the bankruptcy court and the bankruptcy judge of that court had jurisdiction over the trustee's suit, and we affirm the ruling that the payments to

the appellants were invalid as preferential and fraudulent transfers. Additionally, we affirm the ruling that the trustee was entitled to pretrial interest.

FACTS

Prior to the SIPA liquidation proceedings, IBI was a securities broker-dealer incorporated in the State of Colorado. On May 8, 1981, IBI became the principal underwriter of 20 million shares of Chipola Oil Corporation ("Chipola") common stock. As a result of a sudden surge in the price of Chipola stock, the Securities & Exchange Commission ("SEC") began to investigate the existence of a stock manipulation scheme, and suspended trading in Chipola

stock on July 2, 1981. This suspension caused a devaluation of the shares of Chipola stock still possessed by IBI, and prompted an inquiry from the SEC about IBI's continued compliance with the SEC's net capital requirements. IBI immediately sent a telegram to the SEC stating that it was ceasing its business operations as of July 3, 1981 until its capital complied with the SEC's net capital requirements.

On July 8, 1981, IBI asked Gilbert K. Davis, a partners in the Virginia based law firm of Davis, Gillenwater & Lynch to represent it and two of its directors, Richard Belknap and William Chandler, in connection with the SEC';s stock manipulation investigation and its suspension of trading in Chipola stock. Davis agreed to fly to Colorado to

consult with IBI and its directors in exchange for a fee of $10,000.00. Davis spent two days consulting in Colorado, during which time IBI agreed to give Davis a $25,000.00 retainer for additional work to be performed by Davis.

On July 10, 1981, the SEC filed suit against IBI, Belknap, and Chandler, seeking to enjoin them from engaging in further securities transactions wile IBI was in violation of the SEC's net capital requirements. The same day, the Securities Investment Protection Corporation ("SIPC") filed suit against IBI under the SIPA, seeking the appointment of a trustee for the purpose of liquidating IBI. The SIPC's complaint alleged that IBI was in danger of failing to meet its obligations to its customers

as a result of its violation of the SEC's net capital requirements.

Both actions were consolidated in the District Court of Colorado, and a hearing was held on July 10, 1981 at which IBI was represented by Davis. At the conclusion of this hearing, the district court entered a consent order with respect to the SEC action enjoining IBI from doing business and from disbursing funds other than for rent, utilities, and existing employee's salaries. The district court deferred action on the SIPC's request for the initiation of liquidation proceedings.

Just prior to the July 10, hearing, Davis received two checks from IBI that he immediately converted into cashiers checks. The first check, in the amount of $11,858, covered Davis' $10,000 legal

fee and $1,858 in expenses for the two days he spent consulting in Colorado. The second check, in the amount of $25,000, constituted payment of the retainer that IBI had negotiated with Davis for legal services.

On July 14, 1981, the SEC renewed its application for injunctive relief against IBI, alleging that the debtor had issued checks in violation of the July 10 consent order. The following day, the district court approved the SIPC's application for a protective decree and appointed the current trustee to oversee the liquidation of IBI. Following the appointment of the trustee, the liquidation proceeding was removed to the bankruptcy court. With the commencement of the liquidation proceedings, the SEC

withdrew its renewed application for injunctive relief against IBI.

On September 1, 1981, Davis filed a written claim with the trustee against IBI's estate for a cash credit balance and some securities. The trustee issued no determination of the claim. Rather, on January 19, 1982, the trustee commenced the instant suit against Davis and Lynch in the bankruptcy court seeking the return of the $36,858 that IBI paid to Davis on July 10, 1981. The trustee claimed that the payment of $11,585 was voidable as a preference under 11 U.S.C. § 547[1] and that the payment of $25,000

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[1] 11 U.S.C. § 547 provides in relevant part:

> (b) Except as provided in subsection (c) of this section, the trustee may avoid any transfer of an interest of the debtor in property--
>
> (continued...)

was voidable as a fraudulent transfer under 11 U.S.C. § 548[2]. The appellants

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[1](...continued)

(1) to or for the benefit of a creditor;
(2) for or on account of an antecedent debt owed by the debtor before such transfer was made;
(3) made while the debtor was insolvent;
(4) made --
(A) on or within 90 days before the date of the filing of the petition;
. . .

(5) that enables such creditor to receive more than such creditor would receive if --
(A) the case were a case under chapter 7 of this title;
(B) the transfer had not been made; and
(C) such creditor received payment of such debt to the extent provided by the provisions of this title.

[2] 11 U.S.C. § 548 provides in relevant part:

(continued...)

[2](...continued)

(a) The trustee may avoid any transfer of an interest of the debtor in property, or any obligation incurred by the debtor, that was made or incurred on or within one year before the date of the filing of the petition, if the debtor voluntarily or involuntarily --

(1) made such transfer or incurred such obligation with actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such transfer was made or such obligation was incurred, indebted; or

(2)(A) received less than a reasonable equivalent value in exchange for such transfer or obligation; and

(B)(i) was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation;

(ii) was engaged in business or a transaction, or was about to engage in business or a transaction, or was about to engage in business or a transaction, for which any property remaining with the debtor was an unreasonably

(continued...)

filed two counterclaims seeking reimbursement for a hotel bill in the amount of $469.95 incurred by Davis while consulting with IBI in Denver and for legal fees in the amount of $13,819.32 for services rendered to IBI, Belknap and Chandler.

The trustee's claim proceeded to trial on August 7, 1984 and concluded on July 19, 1985 after several lengthy continuances. The bankruptcy court rejected the argument that Article III prevented it from hearing actions seeking recovery of preferences and fraudulent conveyances and it also rejected the

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[2](...continued)
small capital; or
(iii) intended to incur, or believed that the debtor would incur, debts that would go beyond the debtor's ability to pay as such debts matured.

argument that the bankruptcy judge was appointed in violation of Article II. However, the bankruptcy court did conclude that it lacked statutory jurisdiction to entertain suits brought under the aegis of the SIPA. Notwithstanding its conclusion that it lacked jurisdiction, the bankruptcy court proceeded to the merits of the trustee's claim and held that the $11,858 payment to Davis constituted a preference under 11 U.S.C. § 547 and the $25,000 payment to Davis constituted a fraudulent transfer under 11 U.S.C. § 548.

The trustee appealed the bankruptcy court's decision to the district court. In its order of October 5, 1989, the district court reversed the bankruptcy court's determination that it lacked jurisdiction and affirmed its

determination that the two payments to Davis were voidable under 11 U.S.C. §§ 547 and 548. The trustee subsequently moved the court to amend its order for an award of prejudgment interest, and in an order dated May 15, 1990 the court referred this question to the bankruptcy court. The bankruptcy court subsequently determined that the trustee was entitled to prejudgment interest. The appellants appealed the bankruptcy court's determination on March 31, 1992. The appellants subsequently filed the current appeal.

D I S C U S S I O N

The appellants presented the following claims on appeal: 1) the bankruptcy court lacked jurisdiction under Article III to hear actions to recover preferences and fraudulent

transfers, 2) the bankruptcy judge lacked authority to preside over the trustee's suit because he was appointed in violation of Article II, 3) the bankruptcy court lacked statutory jurisdiction to hear cases under the SIPA, 4) the bankruptcy court erred in finding that the $11,858 and $25,000 payments by IBI to the appellants were invalid as preferential and fraudulent transfers respectively under 11 U.S.C. §§ 547 and 548, and 5) the bankruptcy court erred in awarding prejudgment interest to the trustee.

When reviewing challenges to the decisions of the bankruptcy courts, we apply the same standard of review as the district court. Fidelity Sav. & Inv. Co. v. New Hope Baptist, 880 F.2d 1172, 1174 (10th Cir. 1989). Accordingly, the

bankruptcy court's findings of fact are reviewed under a clearly erroneous standard while the court's conclusions of law are subject to de novo review. Id.; Bartmann v. Maverick Tube Corp., 853 F.2d 1540, 1543 (10th Cir. 1988).

I. The Jurisdiction of the Bankruptcy Court Under Article III

Title 15 United States Code § 78fff(b) states that a liquidation proceeding under the SIPA is to be conducted "in accordance with, and as through it was being conducted under . . . Title 11." Title 28 U.S.C. § 157(b)(1) states that bankruptcy courts "may hear and determine . . . all core proceedings arising under title 11." Section 157(b)(2) defines a core proceeding to include "proceedings to

determine, avoid or recover preferences" and "proceedings to determine, avoid, or recover fraudulent conveyances." Pursuant to these provisions, the trustee brought suit against the appellants in the bankruptcy court seeking to avoid IBI's payment of attorney's fees to the appellants as preferential and fraudulent transfers. The appellants argue that the bankruptcy court lacked jurisdiction under Article III to hear the trustee's suit because the trustee's claim involved private rights that may only be adjudicated by Article III tribunals.[3]

In Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833 (1986), the Supreme Court defined a balancing test for determining whether a particular

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[3] Bankruptcy courts are non-Article III tribunals. See Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 50 (1989).

jurisdictional grant to a non-Article III court was constitutional. The Court stated that the critical question is whether the jurisdictional grant "impermissible threatens the institutional integrity of the Judicial Branch," taking into account "the extent to which the 'essential attributes of judicial power' are reserved to Article III courts, and, conversely, the extent to which the non-Article III forum exercises the range of jurisdiction and powers normally vested only in Article III courts, the origins and importance of the right to be adjudicated, and the concerns that drove Congress to depart from the requirements of Article III." 478 U.S. at 851.

In Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 54 (1989), the Court stated,

"[t]he Crucial question, [determining whether Congress may commit adjudication of a statutory cause of action to a non-Article III tribunal] in cases not involving the Federal Government, is whether 'Congress, acting for a valid legislative purpose pursuant to its constitutional powers under Article I, [has] create[d] a seemingly 'private' right that is so closely integrated into a public regulatory scheme as to be a matter appropriate for agency regulation with limited involvement by the Article III judiciary.'" (quoting Thomas v. Union Carbide Agri. Prod. Co., 473 U.S. 568, 593-4).

Applying the Schor test to the instant case, we conclude that the bankruptcy court's determination of the trustee's preference and fraudulent

conveyance claims did not violate Article III. First, proceedings involving preferential and fraudulent transfers are "proceeding[s] of the type traditionally adjudicated by non-article III bankruptcy Courts," In re Comm. of Unsecured Creditors of F.S. Communications Corp., 760 F.2d 1194, 1199 (11th Cir. 1985), at least where, as here, the party receiving the alleged preference or fraudulent conveyance has filed a claim against the debtor's estate. See Katchen v. Landy, 382 U.S. 323, 333-35 (1966). Second, the right of a bankruptcy trustee to void preferences and fraudulent transfers is a congressionally created right pursuant to Congress' authority under Article I Section 8 of the Constitution to provide for uniform bankruptcy laws. In the Matter of Associated Grocers of Nebraska

Cooperative, Inc., 62 B.R. 439, 445 (D. Neb. 1986). In Northern Pipeline Const. Co. v. Marathon Pipe Line, the Supreme Court distinguished between state created rights and rights of congressional origin, holding that Congress had much greater discretion to assign the latter to non-Article III courts. See 458 U.S. 50, 83-84 (1982); In Re Mankin, 823 F.2d 1296, 1308-09 (9th Cir. 1987). Finally, since the assets of the bankruptcy estate are mustered in the bankruptcy court, a strong reason exists for enabling the bankruptcy court to preside over trustee actions designated to augment the estate. See In Re Great Am. Mfg. and Sales, Inc., 129 B.R. 633, 636 (C.D. Cal. 1991). Absent such authority, the bankruptcy proceedings would have to be stayed until the preference and fraudulent conveyance

actions could be adjudicated in the district court, "with all the delay and expense that course would entail." Katchen, 382 U.S. at 229.

Our conclusion that the bankruptcy court had authority over the trustee's suit is consistent with our prior decision in John E. Burns Drilling Co. v. Central Bank of Denver, 739 F.2d 1489, 1494 (10th Cir. 1984), where we concluded that the bankruptcy courts had authority under Article III to hear proceedings involving preferences. Although we decided this case prior to Schor, we stressed that such proceedings were very different from the type of proceedings that Northern Pipeline held must be adjudicated by an Article III court. Id. Other courts have similarly concluded that the bankruptcy courts have authority

to preside over preferential and fraudulent transfer proceedings. See, e.g., In re Mankin, 823 F.2d 1296, 1301-1310 (9th Cir. 1987); In the Matter of Associated Grocers, 62 B.R. at 442-47; cf. In re Davis, 899 F.2d 1136, 1140 n.9 (11th Cir. 1990) (suggesting that the bankruptcy courts may have authority to preside over fraudulent conveyance and preference actions under Article III only where the alleged recipient of the fraudulent conveyance or preference has filed a claim against the debtor's estate). Accordingly, notwithstanding the fact that preferential and fraudulent transfer proceedings may involve private rights, we hold that the bankruptcy court had jurisdiction under Article III to adjudicate the trustee's suit.

II. The Constitutionality of the Bankruptcy Judge's Appointment

In 1978, Congress overhauled the bankruptcy courts by replacing the old referee system with a new Article I bankruptcy court of substantially expanded jurisdiction. The 1978 Act provided that bankruptcy judges would be appointed to 14 year terms by the nomination of the President and the consent of the Senate. The Act established a 4 and 1/2 year transition period, to end on March 31, 1984, during which time the existing bankruptcy courts were to be continued. Section 404(b) of the 1978 Act extended the term of bankruptcy judges serving prior to the Act until the end of the transition period or when their "successors take

office." Pub. L. No. 95-598, 92 Stat. 2683-84 (1978).[4]

As noted previously, the Supreme Court in Northern Pipeline struck down the jurisdictional grant of authority provided to the bankruptcy courts by the 1978 Bankruptcy Reform Act. In response, Congress adopted the Bankruptcy Amendments and Federal Judgeship Act ("BAFJA") on July 10, 1984. Prior to the adoption of BAFJA, Congress extended the transition period established by the 1978 Act until June 27, 1984. BAFJA granted the bankruptcy courts jurisdiction over

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[4] Section 404 (b) provides in relevant part:

> The term of a referee in bankruptcy who is serving on the date of enactment of this Act is extended to and expires on March 31, 1984 or when his successor takes office.

all core bankruptcy matters and established the courts as adjuncts to the district court for all non-core bankruptcy matters. Section 121 (e) provides that "[t]he term of office of any bankruptcy judge who was serving on June 27, 1984, is extended to and shall expire at the end of the day of enactment of this Act." P.L. No. 98-353, 98 Stat. 346 (1984). Section 106(a) provided that "the term of office of a bankruptcy judge who is serving on the date of enactment of this Act is extended to and expires four years after the date of such bankruptcy judge was last appointed to such office or on October 1, 1986, whichever is later." P.L. No. 98-353, 98 Stat. 342 (1984).

The appellant argues that § 106(a) constituted an appointment of bankruptcy

judges in violation of Article II.[5] According to the appellant, the terms of the bankruptcy judges serving during the transition period elapsed on June 27, 1984. Thus, when BAFJA was adopted on July 10, 1984, these positions were all vacant. By continuing the judges in office under the authority of § 106(a), appellant argues, BAFJA in essence resulted in a unilateral congressional appointment of these judges that bypassed Article II's requirement of presidential nomination.

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[5] The appointments clause states that the president "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law." U.S. Const. Art. II, Sec. 2, cl. 2.

The appellants' argument has been rejected by every court that has considered it. See e.g., In re Lombard-Wall, Inc., 48 B.F. 986, 993 (S.D. N.Y. 1985); In re Moody, 46 B.R. 231, 233 (M.D. N.C. 1985); In re Tom Carter Enters., Inc., 44 B.R. 605, 606-07 (C.D. Cal. 1984); In re Benny, 44 B.R. 581 (N.D. Cal. 1984), dismissed in part on other grounds, 791 F.2d 712 (9th Cir. 1986); In re Southern Indus., 66 B.R. 357-59; In the Matter of Baldwin-United Corp., 48 B.R. 49, 53 (Bankr. S.D. Ohio, 1985). The seminal case in this regard is In re Benny. In that case, the court based its conclusion that § 106(a) of BAFJA did not result in an unconstitutional appointment of bankruptcy judges on both § 404(b) of the 1978 Act and § 121(e) of BAFJA.

Section 404 (b) of the 1978 Act, the Benny court argued, contained a holdover provision which expressly authorized the bankruptcy judges to serve beyond the expiration of the transition period. This holdover provision, according to the Court, consisted of a second part of the disjunctive contained in § 404(b) that provided that the bankruptcy judges were to serve until their successors were appointed. In light of this holdover provision, the Benny court concluded, the bankruptcy judges were still lawful office holders at the time BAFJA was adopted, notwithstanding the expiration of the transition period on June 37, 1984. Thus, rather than constituting an unlawful appointment of these judges, § 106(a) merely served to extend the terms of the existing bankruptcy judges,

similar to § 404(b) of the 1978 Act. See id. at 586-88.[6]

Alternatively, the court in Benny held that § 106(a) of BAFJA did not result in an unconstitutional appointment of judges in light of § 121(e) of the same act. The Court concluded that § 121 (e) constituted a holdover provision which extended the terms of the bankruptcy judges until the adoption of BAFJA. See 44 B.R. at 588-92. The Court dismissed the contention that § 121(e) was invalid because it was adopted after the transition period had expired.

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[6] The appellants do not dispute that Congress may, consistent with Article II, unilaterally extend the terms of United States officers who have previously been appointed to their posts in accordance with Article II. See In re Tom Carter, 44 B.R. at 607 ("[T]he Supreme Court has consistently rejected Appointments Clause attacks on legislation changing the terms and duties of office.").

Retroactive legislation in and of itself, the court argued, was not antithetical to the strictures of the appointments clause. Rather, the critical inquiry was whether the legislation impermissible intruded on the inherent authority of the executive branch. The court concluded that § 121(e) did not impermissible intrude on the president's appointment power and therefore affected a valid retroactive extension of the bankruptcy judge's terms of office. Id. at 592-98; see also In re Tom Carter, 44 B.R. at 608 ("[Section 121(e)'s] retroactive extension of office of bankruptcy judge can in no principled way be said to encroach upon the separation of powers principles embodied in said Appointments Clause").

Although plausible arguments can be raised in response to the reasoning adopted by the Benny court, we are ultimately persuaded that this reasoning is correct. Accordingly, for substantially the same reasons advanced in Benny, we reject the appellants' claim in the instant case that the bankruptcy judge was without authority to hear the trustee's suit because he was appointed in violation of Article II.

III. The Jurisdiction of the Bankruptcy Court Under the SIPA

The appellants' final jurisdictional claim is that the bankruptcy court lacked statutory jurisdiction to try cases brought under the SIPA. The bankruptcy court agreed that it lacked jurisdiction but the district court reversed on

appeal. We find that the bankruptcy court possessed statutory jurisdiction over the trustee's suit on the basis of § 78eee(b)(4) of the SIPA.

Section 78eee(b)(4) is entitled "Removal to bankruptcy Court" and provides that "[u]pon the issuance of a protective decree . . . the [district] court shall forthwith order the removal of [a SIPA] liquidation proceeding to the court of the United States in the same judicial district having jurisdiction over cases under Title 11."[7] The

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[7] Section 78eee(b)(4) provides in full:

> Upon the issuance of a protective decree and appointment of a trustee, or a trustee and counsel, under this section, the court shall forthwith order the removal of the entire liquidation proceeding to the court of the United States in the same judicial district having jurisdiction over cases under Title
>
> (continued...)

appellants argue that this section does not confer jurisdiction on the bankruptcy courts because under 28 U.S.C. § 1334(a), adopted as part of BAFJA in response to Northern Pipeline, it is the district courts and not the bankruptcy courts that currently have jurisdiction over title 11 cases.[8] Thus, the appellants conclude, § 78eee(b)(4)'s statement that the district court is to remove a SIPA proceeding to the court having jurisdiction over title 11 cases cannot

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[7](...continued)
11. The latter court shall thereupon have all of the jurisdiction, powers, and duties conferred by this chapter upon the court to which application for the issuance of the protective decree was made.

[8] 28 U.S.C. § 1334(a) provides that "the district court shall have original and exclusive jurisdiction of all cases under title 11."

be read as authorizing removal of SIPA proceedings to the bankruptcy courts.

We reject this reading of § 78eee(b)(4) because it would lead to an absurd result clearly at odds with the intention of Congress. See United States ex rel. Precision Co. v. Koch Indus., Inc., 971 F.2d 548, 552 (10th Cir. 1992) ("[U]nless the statutory language is ambiguous or would lead to absurd results, the plain meaning of the statute must control."); Resolution Trust Corp. v. Westgate Partners, Ltd., 937 F.2d 526, 529-30 (10th Cir. 1991) (a court is to apply the plain language of a statute unless "a plain language interpretation would lead to an outcome so 'absurd' that Congress clearly could not have intended such an outcome"). The SIPA specifies that it is the district courts that have

exclusive jurisdiction over liquidation proceedings commenced by the SIPC. See 15 U.S.C. § 78aa. Thus, to interpret the recipient of the removal action to in § 78eee(b)(4) as also being a district court would lead to a twofold absurdity: from a functional standpoint, it would require the district courts to remove SIPA liquidation proceedings to themselves, and from a linguistic standpoint, it would render meaningless § 78eee(b)(4)'s reference to "the court in the same judicial district," because there is only one district court in each district.

Generally, in determining how to avoid an absurdity generated by the plain language of a statute, a court is to look to congressional intent. See United States v. Ron Pair Enters., Inc., 489

U.S. 235, 242 (1989); Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 571 (1982). In the instant case, we conclude, based on the legislative history of § 78eee(b)(4) and the language of § 78fff(b), that Congress intended § 78eee(b)(4) to authorize the removal of SIPA liquidation proceedings to the bankruptcy courts.

The legislative history of § 78eee(b)(4) clearly reveals that Congress intended to confer jurisdiction on the bankruptcy courts to preside over SIPA liquidation proceedings. The precursor to the current version of § 78eee(B)(4) specifically provided that the district court "may, at any stage of the [SIPA] proceeding, refer the proceeding to a referee in bankruptcy to hear and determine any or all matters."

§ 7(b)(4), Pub. L. No. 95-283, 92 Stat. 257 (1978) (amended 1979). In 1979, this provision was subsequently altered to its current form to conform it to the terminology employed by the 1978 Bankruptcy Reform Act, which expanded the jurisdiction of the bankruptcy courts to all cases arising under title 11. See S. Rep. No. 989, 95th Cong., 2d Sess., at 19 (1978), reprinted in, 1978 U.S.C.C.A.N. 5787, 5804. Accordingly, it is likely that the drafters of the current version of the § 78eee(b)(4) intended the bankruptcy courts to preside over SIPA liquidation proceedings, and that this intention has become obscured only because of the mere quirk that Congress neglected to amend § 78eee(b)(4) following the Supreme Court's decision in

Northern Pipeline in which it struck down the Bankruptcy Reform Act.[9]

Our conclusion that Congress intended the Bankruptcy courts to preside over SIPA proceedings is supported by the language of 15 U.S.C. § 78fff(b), which provides that "a liquidation proceeding shall be conducted in accordance with, and as though it were being conducted under chapters 1, 3, and 5 and subchapters I and II of chapter 7 of title 11." This provision indicates that Congress intended SIPA liquidation proceedings to be treated, in most important respects, identical to a

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[9] That Congress' failure to amend § 78eee(b)(4) is indeed the product of mere oversight rather than deliberate inaction is evidenced by the very title to § 78eee(b)(4), which, as noted above, still reads "Removal to bankruptcy court."

traditional bankruptcy case under title 11. See In re Government Securities, Corp., 972 F.2d 328, 330-31 (11th Cir. 1992). It is of course beyond peradventure that one of the fundamental characteristics of a traditional bankruptcy case under title 11 is that it is conducted by a bankruptcy court. See 28 U.S.C. § 157(a) (conferring jurisdiction on bankruptcy judges to hear "all cases under title 11 and all core proceedings arising under title 11"). It would be truly anomalistic, therefore, for Congress to adopt § 78fff(b) while simultaneously refusing to confer jurisdiction on the bankruptcy courts over SIPA proceedings. Accordingly, we conclude that Congress did intend to confer such jurisdiction on the bankruptcy courts by means of

§ 78eee(b)(4).[10]

IV. The Voidability of the $11,858 and $25,000 Payments.

Although the bankruptcy court concluded that it did not have jurisdiction, the court nevertheless went on to consider the merits of the trustee's suit. It concluded that the $11,858 payment by IBI to the appellants

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[10] The appellants suggest in one statement of their brief that if the bankruptcy court has statutory jurisdiction over SIPA proceedings, this jurisdiction is unconstitutional under Article III. However, since the only proceedings at issue in the instant case are proceedings we need to consider. See Northern Pipeline 458 U.S. at 90 ("[p]articularly in the area of constitutional law such as the Art. III Courts," . . . the Court should decide no more of a constitutional question than is absolutely necessary") (Rehnquist, J., concurring). As we conclude above, the bankruptcy court's authority to hear actions involving preferences and fraudulent transfers does not contravene the strictures of Article III.

was invalid as a preferential transfer under 11 U.S.C. § 547, and that the $25,000 payment was invalid as a fraudulent transfer under 11 U.S.C. § 548. On appeal, the appellants claim that the $11,858 payment fell within the "ordinary course of business" and "contemporaneous exchange for value" exceptions to § 547, and that the $25,000 payment did not constitute a fraudulent conveyance because IBI received equivalent value in exchange for this payment. The bankruptcy court dismissed both of these claims, in part, on the grounds that the appellants failed to comply with the disclosure requirements imposed by 11 U.S.C. § 329(a). We affirm.

Section 329 is a disclosure provision designed to prevent bankruptcy

attorneys from extracting more than their fair share from prospective debtors willing to do whatever is necessary to obtain their counsel of choice and avoid unfavorable bankruptcy proceedings. In re NBI, Inc., 129 B.R. 212, 222 (Bankr. D. Colo. 1991). Section 329(a) provides:

> Any attorney representing a debtor in a case under this title, or in connection with such a case, whether or not such attorney applies for compensation under this title, shall file with the court a statement of the compensation paid or agreed to be paid, if such payments or agreement was made after one year before the date of the filing of the petition, for services rendered or to be rendered in contemplation of or in connection with the case by such attorney, and the course of such compensation.

11 U.S.C. § 329(a). As the foregoing language indicates, the disclosure requirements imposed by § 329 are "mandatory not permissive." In re

Bennett, 133 B.F. 374, 378 (Bankr. N.D. Tex. 1991). Accordingly, an attorney who fails to comply with the requirements of § 329 forfeits any right to receive compensation for services rendered on behalf of the debtor, id. at 379; In re Chapel Gate Apartments, Ltd., 64 B.R. 569, 575 (Bankr. N.D.Tex. 1986), and a court may order an attorney sua sponte to disgorge funds already paid to the attorney, In re Saturley, 131 B.R. 509, 522 (Bankr. D. Me. 1991); In re Kendavis Indu. Int'l. Inc., 91 B.R. 742, 759 (Bankr. N.D. Tex. 1988); In the Matter of Chambers, 76 B.R. 194, 195 (Bankr. M.D. Fla. 1987); In re Chapel Gate, 64 B.R. at 574, 575.

In the instant case, the district court found that the appellants violated § 329 by failing to disclose their

receipt of both the $11,858 payments and the $25,000 payment. We cannot conclude that this finding was clearly erroneous.[11]

Davis testified at trial that he was representing IBI, that he received both of the foregoing payments for such representation, and that the payments were made on the same day that the SIPC filed for liquidation. Furthermore, Davis testified that his initial consultation with IBI, for which he received the $11,858 payments, was in contemplation of a SIPA liquidation

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[11] The appellants do not dispute that § 329 is applicable to SIPA liquidation proceedings by virtue of 15 U.S.C. § 78fff(b), which, as noted above, states that such proceedings are to be conducted "in accordance with, and as though it were being conducted under chapters 1, 3, and 5 and subchapters I and II of chapter 7 of title 11."

proceeding, and that the invoice given by Davis to IBI in exchange for the $25,000 retainer explicitly states that the $25,000 retainer was being given in connection with any "matters . . . involv[ing] . . . SIPC", Addendum to Appellees Br. at 23. Accordingly, we believe the record adequately supports the bankruptcy court's conclusion that the appellants violated § 329 by failing to disclose the payments it received from IBI.

Once the bankruptcy court determined that the appellants violated § 329, the bankruptcy court had the authority to order the appellants to disgorge the two payments they received from IBI. See In re Saturley, 131 B.R. at 522; In re Kendavis Indus. Int'l, Inc., 91 B.R. at 759; In the Matter of Chambers, 76 B.R.

at 195; In re Chapel Gate, 64 B.R. at 575. The appellants do not dispute that the district court could have ordered the return of the payments directly under § 329, but argue that it was error for the court to rely on § 329 in determining whether the payments were invalid under §§ 547 and 548. We disagree. By violating § 329, the appellants forfeited any right to the fees they received from IBI. In re Bennett, 133 B.R. at 379; In re Chapel Gate, 64 B.R. at 575. Although the bankruptcy court could have ordered the appellants to disgorge the payments it received from IBI directly under § 329, we do not believe the bankruptcy court abused its authority in reaching the same result by using § 329 as a basis for approving the trustee's claims under §§ 547 and 548.

V. Prejudgment Interest

The appellants final claim is that the bankruptcy court erred in awarding prejudgment interest to the trustee. We review a bankruptcy court's award of prejudgment interest for abuse of discretion. See In re Bellanca Aircraft Corp., 850 F.2d 1275, 1281 (8th Cir. 1988).

The current bankruptcy code does not specify whether the bankruptcy court may award prejudgment interest to a prevailing trustee. In re Indep. Clearing House Co., 41 B.R. 985, 1014 (Bankr. D. Utah 1984) aff'd and rev'd on other grounds, en banc, 77 B.R. 843 (D. Utah 1987). In the absence of a statutory provision to the contrary, prejudgment interest may generally be

awarded if 1) the award of prejudgment interest would serve to compensate the injured party, and 2) the award of prejudgment interest is otherwise equitable. Anixter v. Home-Stake Production Co., 977 F.2d 1549, 1554 (10th Cir. 1992); FDIC v. Rocket Oil Co., 865 F.2d 1158, 1160 (10th Cir. 1989). In bankruptcy proceedings, the courts have traditionally awarded prejudgment interest to a trustee who successfully avoids a preferential or fraudulent transfer from the time demanded is made or an adversary proceeding is instituted unless the amount of the contested payments was undetermined prior to the bankruptcy court's judgement. See In re Bellanca Aircraft Corp., 850 F.2d at 1281; In re Indep. Clearing House Co., 41 B.R. at 1015.

In the instant case, the award of prejudgment interest to the trustee would unquestionably serve a compensatory purpose. An award of prejudgment interest would serve to compensate the debtor's estate for appellants' use of those funds that were wrongfully withheld from the debtor's estate during the pendency of the current suit. See In re Chase & Sanborn Corp., 127 F.R. 903, 907-10 (Bankr. S.D. Fla. 1991); In re Suburban Motor Freight, Inc., 124 B.R. 984, 1005-06 (Bankr. S.D. Ohio 1990); In re H.P. King Co., 64 B.R. 487, 488-89 (Bankr. E.D. N.C. 1986). Additionally, an award of prejudgment interest would appear to be consistent with the balance of equities.

Finally, there is no dispute that the amount of the contested payment was

clearly determined prior to the bankruptcy courts judgement. The trustee has consistently maintained throughout the course of this action that the full amount of each of the two payments to the appellants by IBI on July 10 were voidable under §§ 547 and 548. Accordingly, we conclude that the district court did not abuse its discretion in awarding the trustee prejudgment interest.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 86-C-1945

In Re

THE INVESTMENT BANKERS, INC.

Debtor

Adversary Proceeding No. 82-M-0087

JAMES H. TURNER, TRUSTEE

Plaintiff,

v.

DAVIS, GILLENWATER & LYNCH, GILBERT K. DAVIS, individually and as a partner of DAVIS, GILLENWATER & LYNCH and O'CONNOR & HANNAN, a partnership,

Defendants

ORDER

M#191132

CARRIGAN, District Judge.

The Securities Investor Protection Corporation (hereinafter "SIPC") and James H. Turner, as Trustee (hereinafter "Trustee") appealed from a bankruptcy court decision in an adversary proceeding. The SIPC objects to the bankruptcy court's determination that bankruptcy courts do not have jurisdiction over liquidations conducted pursuant to the Securities Investor Protection Act, 15 U.S.C. § 78aaa *et seq* (hereinafter "SIPA"). The Trustee objects to the bankruptcy court's conclusion that a payments, made by the Investment Banker's, Inc. (hereinafter "IBI") to the law firm of O'Connor & Hannan, was not voidable as a preferential transfer under 11 U.S.C. § 547(b). Davis, Gillenwater & Lynch

appeal the bankruptcy court's conclusion that two payments they received from IBI were voidable as preferential and fraudulent transfers under 11 U.S.C. §§ 547(b) and 548, respectively. O'Connor & Hannan assert that the bankruptcy court correctly determined that the payment they received from IBI fell within the voidable preference exception in 11 U.S.C. § 547(c)(2).

The adversary proceeding was filed by the Trustee during liquidation of IBI in order to recover payments for legal services allegedly voidable as preferential and fraudulent transfers under 11 U.S.C. §§ 547(b) and 548(a)(2), respectively. The Trustee was appointed under the Securities Investor Protection Act, 15 U.S.C. § 78aaa *et seq.* (hereinafter "SIPA"), and sued under the

above cited sections of the Bankruptcy Code made applicable in a SIPA liquidation by 15 U.S.C. § 78fff(b).

The parties have fully briefed the issues and oral argument would not materially assist my decision. Jurisdiction exists pursuant to 28 U.S.C. § 159 (1988).

Background.

IBI, a Colorado corporation, had acted as a securities broker dealer beginning October 23, 1980. The liquidation proceeding was commenced against the debtor, IBI, by the SIPC, pursuant to authority granted it in the SIPA. The proceeding seeking liquidation of IBI was commenced on July 10, 1981. The application for appointment of a receiver and trustee for the purpose of liquidating IBI was based upon the SIPC's

determination that IBI had failed to meet its obligations to customers imposed by the SIPA. The SIPC also justified its decision to liquidate IBI upon its determination that IBI was in violation of the "net capital" requirements of the Securities Exchange Act of 1934 and Rule 17 CFR 240.15C3-1.

In the order of July 15, 1981, appointing Turner as Trustee, the liquidation proceeding was removed to the United States Bankruptcy Court for the District of Colorado, pursuant to § 5(b)(4) of SIPA, 15 U.S.C. § 78eee(b)(4)(Supp. 1979). After removal to the bankruptcy court, Turner filed a complaint seeking to avoid the transfer of four checks totaling $87,517.80 to the law firms of Davis, Gillenwater & Lynch

and O'Connor and Hannan. Those four checks are as follows:

> (a) Check #13417, dated July 10, 1981, payable to Gilbert K. Davis, Esquire, in the amount of $11,858.00;
>
> (b) Check #13418, dated July 10, 1981, payable to O'Connor & Hannan, in the amount of $25,659.80;
>
> (c) Check #13419, dated July 10, 1981, payable to O'Connor & Hannan Trust Account in the amount of $25,000.00;
>
> (d) Check #13432, dated July 10, 1981, payable to Gilbert K. Davis, Esquire, of Davis, Gillenwater & Lynch, in the amount of $25,000. (Bankruptcy Opinion at 2-4, Record at 303-05)(hereinafter "Op. at, R. at")

The bankruptcy court made the following findings of fact: On July 8, 1981, Gilbert Davis was contacted by a representative of IBI, to represent the debtor and two of its officers, Belknap and Chandler. Davis went to Denver with two other attorneys from Virginia. A

fee of $10,000 was arranged, to be divided among the three attorneys. Conferences were held on July 8 through 10, 1981. The evidence indicates that the parties and these attorneys were aware during the entire course of Davis' representation, of at least the possibility that the SEC would file a liquidation proceeding and seek injunctive relief against IBI in the United States District Court. A $25,000 retainer was agreed upon for further work. The fee included Davis' appearance at the hearing of July 10, 1981 concerning the SEC's application for an injunction and the SIPC's action to liquidate IBI.

The evidence establishes that David received checks #13417 and #13432 at about noon on July 10, 1981. These were

promptly exchanged for cashier's checks at the First National Bank of Denver. Davis claims that he did not learn of the SEC's action, that was commenced the same date, until after he had negotiated these checks.

O'Connor and Hannan had represented IBI since 1980. Of the two checks received by this firm, #13418 was given to O'Connor and Hannon for previously rendered legal services. The second check, #13419, was paid to O'Connor and Hannan as a retainer for legal services to be performed in connection with IBI's trading suspension. The O'Connor and Hannan checks were received at approximately 10:00 a.m. on July 10, 1984 and were cashed soon thereafter. These checks were taken to the bank immediately because O'Connor and Hannan had

previously received an insufficient funds check from IBI.

I will address the following issues in the order presented.

(1) Whether bankruptcy judges were constitutionally appointed?

(2) Whether bankruptcy courts have jurisdiction over SIPA liquidations?

(3) Whether the payment of $25,659.80 to O'Connor and Hannan, check #13418, fell within the voidable preference exception in 11 U.S.C. § 547(c)(2) as it existed before the Bankruptcy Amendments and Federal Judgeship Act of 1984?

(4) Whether the payment of $11,858.00 to Davis, Gillenwater & Lynch, check #13417, constituted a voidable preference under 11 U.S.C. § 547(b)?

Under Rule 8013, Rules of Bankruptcy Procedure[1], the district court may

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[1] Bankruptcy Rule 8013 provides in pertinent part:

> "On an appeal the district court . . . may affirm, modify, or reverse a bankruptcy court's judgement, order or decree or remand with (continued...)

affirm, modify, reverse or remand a bankruptcy court judgement. *In re Brown*, 68 B.R. 670 (D. Colo. 1986). This procedural authority was stated by the *Brown* court as follows:

> "[The District] Court is bound to accept the Bankruptcy Judge's findings of fact unless they are clearly erroneous. Similarly, due regard in this context must be given to the lower court's opportunity to hear firsthand the testimony of the witnesses. However, this same presumption does not apply to conclusions of law, and this Court may make an independent

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[1](...continued)
instructions for further proceedings. Findings of fact shall not be set aside unless clearly erroneous and due regard shall be given to the opportunity of the bankruptcy court to judge the credibility of the witnesses."

This rule accords to the findings of a bankruptcy judge the same weight given the findings of a district judge under Rule 52, Fed. R.Civ.P. 9 *Collier on Bankruptcy* par 8013.01, at pp. 8013-1 (15th ed. 1988).

> examination and determination of the ultimate legal conclusions to follow from the facts. . .
>
> The 'clearly erroneous' standard was explained by the Supreme Court in *Comm. v. Duberstein*, 363 U.S. 278, 80 S.Ct. 1190, 4 L.Ed.2d 1218 (1960), wherein the Court stated: 'A finding is "clearly erroneous" when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. . . The rule itself applies also to factual inferences from undisputed basic facts. . .'" *id.* at 671 (citations omitted).

Thus, the bankruptcy court's factual findings are not to be disturbed on appeal unless they are clearly erroneous. However, the bankruptcy court's conclusions of law will be reviewed under a *de novo* standard. *In re Mullet*, 817 F.2d 677-79 (10th Cir. 1987).

The Constitutionality of the Bankruptcy Judges' Terms.

The Davis defendants first address the constitutionality of the bankruptcy judges' terms. (Davis brief, at 6.). These defendants assert that the bankruptcy court did not have jurisdiction to hear this matter because when BAFJA became law all bankruptcy judge positions were vacant. They contended that this occurred because the Bankruptcy Act of 1978 expired on June 27, 1984 but the Bankruptcy Amendments and Federal Judgeship Act of 1984 (hereinafter "BAFJA")[2] was not signed into law until July 10, 1984. The Davis defendants further assert that BAFJA,

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[2] Pub.L. No. 98-353, 98 Stat. 333 (1984).

sections 121(e)[3] and 106(a),[4] is an attempt by Congress to retroactively reinstate bankruptcy judges whose terms had expired on June 27, 1984, thus violating the Appointments Clause of the United States Constitution.[5]

Numerous courts interpreting the of BAFJA provisions that extended the terms of bankruptcy judges, have held that they did not violate the appointments clause.

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[3] Section 121(e) of BAFJA provides: "The term of office of any Bankruptcy Judge who was serving on June 27, 1984, is extended to and shall expire at the end of the day of enactment of this Act."

[4] Section 106(a) of BAFJA provides: "The term of an office of a bankruptcy judge who is serving on the date of the enactment of this Act is extended to and expires four years after the date such bankruptcy judge was last appointed to such office or on October 1, 1986, whichever is later."

[5] U.S. Const. art. II, § 2, cl. 2.

See In re Sweetwater, 55 B.R. 724, 726-28 (D. Utah 1985). The *Sweetwater* court stated:

> This court agrees with Jude Schnacke's conclusion in that case [*In re Benny*, 44 Bankr. 581, 587-88 (N.D. Cal 1984)] that there was no 'gap' between June 27, 1984 and July 10, 1984, during which the bankruptcy courts ceased to exist. The hold-over provisions of the 1978 Act, sections 404(b) and (d) (as amended), authorized the bankruptcy judges to continue in office until June 27, 1984, or until their successors were appointed or took office. Because no bankruptcy judges were appointed or took office between June 27 and July 10, 1984, the bankruptcy judges serving on June 27, 1984, continued in office at least until July 10, 1984. Thus, the 1984 Act is not constitutionally infirm. It did not 'appoint' interim bankruptcy judges, in violation of the appointments clause, because there were no vacant offices to appoint them to. Neither was it an impermissible retroactive extension of the bankruptcy judges' offices, since their offices had not

expired at the time the act was passed." *Id.* at 727.

Accord: In re Production Steel, Inc., 48 Bankr. 841, 846-49 (M.D. Tenn. 1985); *In re Moody*, 46 Bankr. 231, 233 (M.D. N.C. 1985); *In re Tom Carter Enterprises, Inc.*, 44 Bankr. 605, 607-08 (C.D. Cal. 1984); *In re Western World Funding, Inc.*, 52 Bankr. 743, 762 (Bankr. D. Nev. 1985); *Matter of Baldwin-United Corp.* 48 Bankr. 49,53 (Bankr. S.D. Ohio 1985). The defendants have not cited any case holding that BAFJA is unconstitutional. Therefore, the defendants' position is untenable and I uphold the constitutionality of BAFJA.

Bankruptcy Court Jurisdiction Over SIPA Liquidations.

The bankruptcy court concluded that BAFJA deprived it of jurisdiction over SIPA liquidations. (Op. at 18, R. at

319)[6] The Davis defendants assert that the bankruptcy court erred in determining that it had jurisdiction to adjudicate preferential and fraudulent transfer actions brought by the trustee. (Davis brief, at 10-12). I need not reach this issue, however, if I conclude that the bankruptcy court erred by concluding that bankruptcy courts lack jurisdiction over SIPA liquidations. If bankruptcy courts have the authority to preside over SIPA liquidations, they must be able to apply

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[6] It must be noted that while the bankruptcy court held that it lacked jurisdiction over SIPA liquidations it still proceeded to rule on the remaining issues. The Court stated: "recognizing that legal analysis and authority has previously been strained and stretched to save the bankruptcy court system where Congress has failed to act, it is possible that, on appeal, analysis by an appellate court may create authority where I have found none to exist." (Op. at 18, R. at 319).

11 U.S.C. §§ 547 and 548 (sections of the Bankruptcy code allowing the trustee to set aside preferential and fraudulent transfers) made applicable in SIPA liquidations by 15 U.S.C. § 78fff(b), in order to effectively carry out the liquidation.

From the bankruptcy court's perspective, 28 U.S.C. § 157 repeals by implication 15 U.S.C. § 78eee(b)(4). Section 157 defines the jurisdiction of bankruptcy courts. It provides:

> "(a) Each district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for this district.
>
> (b)(1) Bankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11, referred under subsection (a) of this section,

> and may enter appropriate orders and judgements, subject to review under § 158 of this title."

Title 15 U.S.C. § 78eee(B)(4), on the other hand, is the section of SIPA that authorizes the removal of SIPA liquidations to bankruptcy court. It provides:

> "REMOVAL TO BANKRUPTCY COURT.
> Upon the issuance of a protective decree and appointment of a trustee, or a trustee and counsel, under this section, the court shall forthwith order the removal of the entire liquidation proceeding to the court of the United States in the same judicial district having jurisdiction over cases under title 11. The latter court shall thereupon have all of the jurisdiction, powers, and duties conferred by this chapter upon the court to which application of the issuance of the protective decree was made."

The bankruptcy court reasoned that SIPA matters arise under title 15 and are not

"cases under title 11" nor proceedings "arising under" or "arising in or related to a case under title 11." (Op. at 14, R. at 315). The court engaged in an extremely literal interpretation of the two statutes; because BAFJA vests exclusive jurisdiction of title 11 cases in the district courts, a strict reading of section 78eee(b)(4) would require a district court to remove a SIPA liquidation to itself. The bankruptcy court concluded that this interpretation would result in absurdity. (Op. at 16, R. at 317).

Although literally, it appears that BAFJA renders 15 U.S.C. § 78eee(b)(4) meaningless, a court is required to avoid interpretations of statutes that result in "self-nullification" or an unreasonable result. In *Takao Ozawa v.*

United States, 260 U.S. 178, 43 S.Ct. 65, 67 L.Ed. 199 (1922), the United States Supreme Court stated:

> "It is the duty of this Court to give effect to the intent of Congress. Primarily this intent is ascertained by giving this words their natural significance, but if this leads to an unreasonable result plainly at variance with the policy of the legislation as a whole, we must examine the matter further. We may then look to the reason of the enactment and inquire into its antecedent history and give it effect in accordance with its design and purpose, sacrificing, if necessary, the literal meaning in order that the purpose may not fail." *Id.* at 194, 43 S.Ct. at 68.

Additional rules of statutory construction also mandate that this court not interpret BAFJA as repealing 15 U.S.C. § 78eee(b)(4). *See Watt v. Alaska*, 451 U.S. 259, 101 S.Ct. 1673, 68 L.Ed.2d 80 (1981). *Watt* stated:

> "Without depreciating this general rule, [that the more recent of two irreconcilably conflicting statutes governs] we decline to read the statutes as being in irreconcilable conflict without seeking to ascertain the actual intent of Congress. Our examination of the legislative history is guided by another maxim: 'repeals by implication are not favored.' *Morton v. Mancari*, 417 U.S. [535], at 549 [94 S.Ct. 2474, at 2482, 41 L.Ed.2d 290] [(1974], quoting *Posadas v. National City Bank*, 296 U.S. 497, 503 [56 S.Ct. 349, 352, 80 L.Ed. 351] (1936). 'The intention of the legislature to repeal must be clear and manifest . . . ' We must read the statutes to give effect to each if we can do so while preserving their sense and purpose." *Id.* 451 U.S. at 266-67, 101 S.Ct. at 1678 (citations omitted).

Because repeals by implication are not favored, absent a clear legislative intent to repeal, a repeal by implication may be found only if there is a "manifest inconsistency" or "positive repugnance" between two statutes. *Mercantile*

National Bank v. Langdeau, 371 U.S. 555, 565 (1963) (citing *United States v. Borden Co.*, 308 U.S. 188, 198-99 (1939). On the same subject, *Morton* stated:

> "In the absence of some affirmative showing of an intention to repeal, the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable . . . Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment." *Morton v. Mancari*, 417 U.S. 535, at 550-51, 94 S.Ct. 2474, at 2482-83, 41 L.Ed.2d 290 (1974).

In the instant case, I find no evidence of any intention by Congress for BAFJA to repeal SIPA. Federal district courts have long engaged in the practice of referring SIPA liquidations to bankruptcy courts.

In *Exchange National Bank of Chicago v. Wyatt*, 517, F.2d 453 (2d Cir. 1975),

the Second Circuit concluded that the referral of SIPA proceedings to the Bankruptcy courts effectuated the purposes of SIPA. It is important to note that the court came to this conclusion while interpreting SIPA before it contained any of the direct removal provision that it now contains in 15 U.S.C. § 78eee(b)(4). The court emphasized that the power of the district court to refer SIPA proceedings to referees in bankruptcy was not only "consistent with the purposes of SIPA but essential." *Id.* at 457. The court went on to state:

> "The process for the determination of ["customer"] claims [in a SIPA proceeding] did not differ in any significant respect from what would have been required in a large stockbroker bankruptcy before enactment of SIPA; . . . This is the kind of business for which bankruptcy judges

> have developed special expertness and administrative skills and which Congress did not intend to dump on already overburdened district courts with needed clerical and other facilities." *Id.* at 457-58.

In a more recent decision, the Second Circuit affirmed its preference that SIPA liquidations be processed in bankruptcy court. *See S.E.C. v. American Board of Trade, Inc.* 830 F.2d 421, 436 (2d Cir. 1987).[7] The court emphasized that "[w]e are, however, disturbed by the subsequent use of the receivership to effect the liquidation of the ABT entities." *Id.* at 436. After reviewing three of its former decisions where the

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[7] For an excellent discussion of *S.E.C. v. American Board of Trade, Inc.* see Sabino, *The Role of Bankruptcy Courts in Stockbrokerage Liquidations,* 16 Sec.Reg.L.J. 227 (1988).

court had expressed similar reservations,[8], the court stated:

> "[T]he functions undertaken by the district court in this case demonstrate the wisdom of not using a receivership as a substitute for bankruptcy . . . . [T]he district court essentially transformed itself into a court of bankruptcy aided by a receiver performing the tasks of a bankruptcy trustee. For example, the court has taken upon itself the burden of processing proof-of-claim forms filed by thousands of noteholders and other creditors, of setting priorities among classes of creditors, and of administering sales of real property, all without the aid of either the experience of a bankruptcy judge or the guidance of the bankruptcy code . . . . We now state, however, that in actions of the present kind brought in the future by the SEC, we

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[8] The court reviewed and quoted its decisions in *Esbitt v. Dutch-American Mercantile Corp.*, 335 F.2d 141 (2d Cir. 1964); *S.E.C. v. S & P National Corp.*, 360 F.2d 741 (2d 741 (2d Cir. 1966); and *Lankenau v. Coggeshall & Hicks* 350 F.2d 61 (2d Cir. 1965).

> expect counsel for the agent, as an officer of the court and as part of his or her individual professional responsibility, to bring our views, as stated in this and other decisions, to the attention of the district court before the court embarks on a liquidation through an equity receivership." *Id.* at 437-48 (emphasis added).

Because I find no "manifest inconsistency" or "positive repugnancy" and do not find that BAFJA and SIPA are irreconcilable, I adopt the Second Circuit's reasoning set forth in the line of cases relied on and culminating in *S.E.C. v. American Board of Trade, Inc.*, to the effect that bankruptcy courts are the tribunals best equipped to preside over SIPA liquidations and are authorized to do so.

In enacting BAFJA, Congress did not expressly repeal 15 U.S.C. § 78eee or 78fff. I decline to hold that a repeal

by implication occurred in this instance. absent express language to the contrary I conclude that Congress intended these sections of SIPA to remain in force after BAFJA and that Congress intended that SIPA liquidations be conducted in bankruptcy courts. Furthermore, I conclude that, although a bankruptcy removal under 28 U.S.C. § 157 is discretionary with the district court, and a SIPA liquidation removal under 15 U.S.C. § 78eee(b)(4) appears mandatory by its language, the difference is insignificant. as a practical matter all bankruptcy cases can be removed even though they can be withdrawn pursuant to 28 U.S.C. § 157(d). By reconciling BAFJA and SIPA, removal of SIPA liquidations can be accomplished at the discretion of the district court and thereby fulfill

the intent of Congress in BAFJA to place supervision of bankruptcy courts in the district courts.

Payment of $25,659.80 to O'Connor & Hannan - Check #13418

The bankruptcy court concluded that check #13418, paid to O'Connor & Hannan, was not voidable as a preferential transfer because it fell within the exception of 11 U.S.C. § 547(c)(2). (Op. at 23, R. at 324). The Trustee presents a compelling argument that all the elements of a preferential transfer under 11 U.S.C. § 547(b) exist with regard to this payment. I need only reach this issue if all the elements of the exception found in 11 U.S.C. § 547(c)(2) are not present.

In order for the exception set out in 11 U.S.C. § 547(c)(2) to apply, the following elements must exist with regard to the transfer:

> (1) The transfer must be made in payment of a debt incurred in the ordinary course of business or financial affairs of the debtor and the transferee;
> (2) The transfer must be made not later than 45 days after such debt was incurred;
> (3) The transfer must be made in the ordinary course of business or financial affairs of the debtor and the transferee; and
> (4) The transfer must be made according to ordinary business terms.

It is important to note that BAFJA deleted the forty-five day requirement of 11 U.S.C. § 547(c)(2). However, this case the forty-five day limit applies because the case was filed on July 10, 1981. BAFJA explicitly states that it will only apply to cases filed within 90 days after July 10, 1984. BAFJA, Pub.L.

98-353, § 553(a), 98 Stat. 392 (1984). 1984 U.S. Code Cong. and Admin. News, p. 576.

The bankruptcy court found that: "[t]he services rendered which are represented by Check No. 13418 were for legal services rendered prior to an not in contemplation of or in connection with the SIPA action." (Op. at 22, R. 323). The court also found that O'Connor and Hannan had represented IBI since 1980. (Op. at 9, R. at 310). Therefore, I hold that these debts were incurred in the ordinary course of business. I will next consider the third and fourth elements and later return to the second.

The bankruptcy court concludes that the payment was made in the ordinary course of business and according to ordinary business terms. (Op. at 23, R.

at 324). The Trustee, however, argues that:

> This finding is clearly erroneous in light of the fact that trading in IBI's principal securities produce - Chipola Stock - had been suspended by the SEC; IBI had ceased doing any securities business whatsoever because it was in violation of the Commission's net capital rule; there were rumors on the street that the SEC was going to close down IBI; both the NASD and the SEC were in IBI's offices investigating its books and records, taking depositions and interviewing IBI's principals; and SIPC liquidation had been discussed by the layer-defendants and the lawyer-defendants were demanding immediate payments which they instantly exchanged for cashier's checks. IBI didn't indeed, it could not, do anything in the ordinary course of business after July 2, 1981. (Trustee's brief, at 8).

July 2, 1981 is the date when, the Trustee alleges, Greg Kearns, one of O'Connor & Hannan's attorneys, "became aware of the suspension of Chipola, which

he knew was the major asset of IBI; and he was aware in response thereto, IBI had ceased operations in the securities business." (Trustee's brief, at 5).

O'Connor & Hannan assert, in response, that IBI was unable to meet net capital requirements because of the stop-trade order issued by the SEC on July 2, 1981.[9] Only one summary stop-trade

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[9] The bankruptcy court acknowledged the method employed by the SEC to declare that a company is in violation of the net capital requirement. The bankruptcy Court stated:

> It is interesting to observe that all of these figures and requirements [associated with the valuation of the debtor's net capital] are predicated upon a system whereby the SEC can suspend trading for the investigation of a violation of the new capital rule, thus creating a situation where there is no ready market. Since there is no ready market, paragraph 15-c3-1 of the net capital rule [17 CFR 240.15c3-1] requires that the stock be

(continued...)

order could be issued by the SEC without notice and a hearing. *Sloan v. S.E.C.* 547 F.2d 152, 156-57 (2d Cir. 1976). O'Connor & Hannan properly point out that at the time check #13418 was received, the stop-trade order was about to expire and thereafter IBI would be able to meet its net capital requirement and resume trading securities. Further, the

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[9](...continued)
valued at zero. This, then, is of great aid to the SEC in supporting it [sic] contention that the organization under investigation is in violation of the net capital rule. On this basis, the SEC then continued the suspension in trading until any net capital deficiencies it has declared to exist by virtue of its own creation of 'no ready market' is [sic] replenished from other sources. This manipulative practice has apparently received the sanction of the courts and the Congress over the years." (Op. at 6, R. at 307).

bankruptcy court's findings of fact show that IBI had sent funds payable toward past-due accounts in March and May, 1981. (Op. at 9, R. at 310). Therefore, I hold that the transfer of $25,569.80, made July 10, 1981, was in the ordinary course of business and according to ordinary business terms.

The remaining element of 11 U.S.C. § 547(c)(2) is the requirement that the debt must have been incurred within 45 days of the payments. Although the bankruptcy court made detailed findings as to the time most of the debt represented by the $25,569 payments was incurred, the court failed to mention that it was applying the 45 day limit. This 45 day time limit applies because the pre-BAFJA version of 11 U.S.C. § 547(c)(2) was in effect when the transfer

at issue occurred. Therefore, the only remaining issue with regard to the $25,659.80 payments is when the 45 day period began.

O'Connor & Hannan assert that the entire amount of this payment falls within the 45 day time limit. They argue that although payment was received more than 45 days after some of the services were rendered, they received payment within 45 days after sending a statement to IBI. (O'Connor brief, at 17-18). This position, however, indicates a fundamental misunderstanding of the 45 day requirement and of the purpose behind 11 U.S.C. § 547(c)(2).

The purpose of 11 U.S.C. § 547(c)(2) is to leave normal financial transactions undisturbed. House Report No. 95-595, 95th Congress, 1st Sess. 373-374 (1977),

U.S. Code Cong. & Admin.News 1978, pp. 5787, 6329, 6330. With this purpose in mind, courts interpreting § 547(c)(2) hold that "a debt is incurred on the date upon which the debtor first becomes legally bound to pay." *In re Balducci Oil Co., Ltd.* 33 B.R. 843, 846 (Bankr. D.Colo. 1983) (citing *In re Iowa Premium Service Co., Inc.* 695 F.2d 1109, 1111 (8th Cir. 1982); *Barash v. Public Finance Corp.*, 658 F.2d 504, 512 (7th Cir. 1981); and *In re Brown*, 20 B.R. 554 (Bankr. N.Y. 1982).

In this situation, IBI became legally bound to pay when the services were performed and not when IBI received a statement. *In re Mindy's, Inc.*, 17 B.R. 177 (Bankr. S.D. Ohio 1982) does nothing to support the position taken by O'Connor & Hannan and IBI did not incur

the debt for the purposes of § 547(c)(2) until they sent a statement. Any interpretation and application of *Mindy's*, must be confined to is particular facts. In *Mindy's*, the debtor agreed to pay rent on commercial property assessed as a percentage of the profit earned by the debtor in the operation of a business son the leased premises. The runt became due 10 days into the month following the month for which the rent was payable. *Id.* at 179. The court held that the debtor did not incur the debt for the purposes of § 547(c)(2) until "the actual rental obligation for the prior month could be calculated and thus due under the terms of various leases." *Id.* at 180.

In this situation, I decline to apply the *Mindy's* reasoning because the

amount owed for legal services was not indeterminate until IBI received a statement from O'Connor & Hannan. Although the exact amount of the fees owed by IBI may not have been calculated immediately after O'Connor & Hannan provided the legal services, these fees were clearly calculable as they were incurred. For this reason, I hold that only the debts incurred 45 days before July 10, 1981, fall within the exception in 11 U.S.C. § 547(c)(2). Thus I conclude that the bankruptcy court erred as a matter of law when it ruled that O'Connor & Hannan were entitled to retain the entire $25,659.80.

O'Connor & Hannan received check #13418 on July 10, 1981, and therefore the 45 day period began May 26, 1981. In the bankruptcy court's findings, "the sum

of $8,146.25 was attributable to legal services rendered in June of 1981, together with costs incurred in the amount of $71.30." (Op. at 9, R. at 310.) Therefore, O'Connor & Hannan are entitled to retain $8,217.55 plus whatever fees can be attributed to services rendered May 26 through May 31, 1981.

Defendant's exhibit N, introduced in the bankruptcy court, adversary proceeding, consists of daily time sheets of O'Connor & Hannan, including entries for the last six days of May 1981. These time sheets show that a total of 20.5 hours were billed to IBI for the period May 26, to May 31, 1981. Further, the defendant's exhibit O is a hand-written billing analysis that sets out the hours billed by various individuals, the

different hourly rates charged by each individual and the total amount of fees attributable to each individual. this analysis provides that a total of $1,675 in fees was incurred by IBI from May 26, to May 31, 1981.

Defendant's Exhibit H is a statement for all legal services rendered by O'Connor & Hannan to IBI in May 1981. It indicates that IBI incurred $1,879.65 in costs for various disbursements during that month. While the statement does not delineate the amount of costs incurred on a weekly or daily basis in the same manner that exhibits N and O delineate how legal fees were incurred, a figure for the period May 26 through May 31 can be estimated. Dividing the total of $1,879.65 by twenty-one, the number of workdays in May, 1981, and then

multiplying by four, the number of days IBI incurred legal fees from May 26 to May 31, 1981, equals $358.03. Adding this to the $1,675 in fees gives $2,033.03 as the total amount incurred by IBI from May 26 to May 31, 1981.

Adding this figure to the $8,217.55 in fees and costs incurred by IBI in June 1981 equals $10,250.58 as the total amount of check #13418 that O'Connor & Hannan are entitled to retain. Because only $10,250.58 falls within the 45 day period, and therefore, within the exception of § 547(c)(2), I must determine if the rest of this payment, $15,409.22, constitutes an avoidable preference under 11 U.S.C. § 547(c)(2), I must determine if the rest of this payments, $15,409.22, constitutes an avoidable preference under 11 U.S.C. §

547(b).[10] Section 547(b) is "intended

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[10] O'Connor & Hannan argue that the issue of whether check #13418 is a voidable preference under § 547(b) is not properly before this court because the Trustee did not specifically refer to subsection (b) of § 547 but only to § 547(c) when he designated issues on appeal. I hold that the Trustee fulfilled his obligation to designate the record by requesting the entire transcript. Bankr. Rule 8003 is modeled after Rule 10, Fed.R.App.P. In the context of Rule 10 it has been stated:

> "[i]f the entire transcript is on file, or if the appellant orders the whole of its, he has no further responsibility under Rule 10(b). He need not file a designation upon the appellee and he need not serve a statement of the issues which he intends to present on the appeal." *9 J. Moore, B. Ward & J. Lucas, Moore's Federal Practice* par. 210.05 (2d ed. 1985).

Furthermore, courts dealing with situations where the appellant has failed to properly designate issues on appeal have held that dismissal of the appeal is not warranted. *See Island Creek Coal Co. v. Local Union No. 1827,* 568 F.2d 7, 8 (6th Cir. 1977)(holding that designating only a partial transcript for appeal did

(continued...)

to discourage creditors 'from racing to the courthouse to dismember the debtor during his slide into bankruptcy' and to facilitate equality of distribution." *In re Balducci Oil Co., Inc.* 33 B.R. 843,

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[10](...continued)
not warrant dismissal where appellees were neither misled nor prejudiced by appellant's failure to serve a statement of issues, appellees could have sought supplement to record, and there was no evidence that appellant's omission was made in bad faith); *See also In re Bienert,* 48 B.R. 326, 326-28 (N.D. Iowa 1985) (holding that an untimely designation of issues by the debtor did not warrant dismissal).

Because the Trustee designated the entire record in this matter and he raised issues concerning § 547(c), I hold that he fulfilled his duty under Bankruptcy Rule 8003. I also hold that O'Connor & Hannan will not be prejudiced by my addressing issues dealing with § 547(b). If a transfer does not fall within an exception under § 547(c) then the next logical point of inquiry is whether it is avoidable under § 547(b). Even though O'Connor & Hannan failed to brief the issue of whether check #13418 is voidable as a preferential transfer, I hold that further briefing would not materially assist my decision.

845 (Bankr. D. Colo 1983) (quoting HR Rep. No. 95-595, 95th Congress, 1st session at 177-178 (1977), U.S.Code Cong. & Admin. News 1978, pp. 5787, 6138; citing *In re Martella*, 22 B.R. 649 (Bankr. D.Colo. 1982). To establish a voidable preference the Trustee must prove all five elements of § 547(b). They are:

> "any transfer of property of the debtor --
> (1) to or for the benefit of a creditor;
> (2) for or on account of an antecedent debt owed by the debtor before such transfer was made;
> (3) made while the debtor was insolvent;
> (4) made --
> (A) on or within 90 days before the date of the filing of the petition; or
>
> * * * * * *
>
> (5) that enables such creditor to receive more than such creditors would receive if --
> (A) the case were a case under Chapter 7 of this title;

(B) the transfer had not been made; and
(C) such creditor received payments of such debt to the extent provided by the provisions of this title."

In this situation, check #13418 clearly benefitted O'Connor & Hannon on account of an antecedent debt, 90 days before the filing of the SIPA liquidation. Mr. Kearnes indicated that IBI had a continuous past due balance with O'Connor & Hannan throughout 1981. (Bankr. Trans. vol V, at 412-18). Therefore, the only disputed elements are §§ 547(b)(3) and 547(b)(5).

Based on findings of fact derived from the testimony of expert accountant witnesses (Op. at 4-8, R. at 305-09), the bankruptcy court concluded that IBI was insolvent. (Op. at 21, R. at 322). The bankruptcy court valued Chipola Stock at $.19, a price it determined to be the

true value of the stock when trading was suspended. The court made this finding of fact by determining that Jackson Arthur Woodruff, Jr., a NASD examiner, was the most credible of the expert witnesses who testified as to the stock's value (Op. at 8, R. at 309). There is nothing to indicates that this is clearly erroneous.

It is clear that O'Connor & Hannan received more than it would have under Chapter 7 because IBI's insolvent financial condition indicates that is unsecured creditors would receive a small percentage, if any, of the amounts owed them.

The bankruptcy court also erred as a matter of law when it concluded that O'Connor & Hannan had a valid attorney's lien, as provided in Colo. Rev. Stat. §

12-5-119 (1973), on check #13418. This statute allows an attorney a lien on the property, including money of a client, that comes into the attorney's possession, in order to secure payment of funds owed to the attorney. *See In re Ranes,* 31 B.R. 70, 72 (Bankr. D.Colo. 1983) ("[t]he statute grants attorneys two types of liens: (1) a possessory lien on all the papers of his client in his possession; and (2) a 'charging lien' on any judgement he may have obtained:); *In re Storage Tech. Corp.*, 45 B.R. 363, 364 (D. Colo. 1985) (Quoting *Ranes.* at 72); *Donaldson, Hoffman & Goldstein v. Gaudio,* 260 F.2d 333, 335 (10th Cir. 1958) (interpreting the statuary predecessor to Colo. Rev. Stat. §§ 12-5-119 & 12-5-120).

In the instant case, the money came directly from the client IBI to pay a debt. It did not come from a third source, such as the proceeds of a settlement, as contemplated by the statute. To adopt the bankruptcy court's logic would require me to hold that O'Connor & Hannan had an attorney's lien **before** they actually had possession of the check. This is clearly not the type of lien intended by Col.Rev. Stat. § 12-5-119 (1973). *cf. In re Oiltech, Inc.* 38 B.R. 484, 487 (Bankr.D.Nev. 1984)(holding that a law firm, possession $7,000.00 owed to its client when compensable work had been completed, was entitled to a retaining or possessory lien). Other courts have not hesitated to set aside transfers as avoidable preferences where a debtor has transferred funds to an

attorney on the eve of bankruptcy. *See In the matter of Darke*, 18 B.R. 510, 513-14 (Bankr. E.D. Mich. 1982). Therefore, $15,409.22 of check #13418 falls within the trustee's avoidance power as a preferential transfer.

Payment of $11,858 to Gilbert K. Davis - Check #13417.

With regard to the payment of $11,858 to Gilbert K. Davis, the bankruptcy court stated:

> "[t]he evidence convinces me that all of the services rendered by Davis and by Davis, Gillenwater & Lynch were in contemplation of or in connection with the SIPA case and its anticipated filing. Accordingly, [11 U.S.C.] § 329 of the Code is applicable, and Davis has filed to establish compliance with that section. This destroys any possible exception to avoidance under § 547(c)(2). Further, most, if not all, of the representation provided by Davis and Davis,

Gillenwater & Lynch was for individuals and not for IBI."

The court therefore concluded that this payment was an avoidable preference under 11 U.S.C. § 547(b). Because I do not find the bankruptcy court's findings to be clearly erroneous, I confirm that court's legal conclusion that failure to comply with 11 U.S.C. § 329 destroyed any exception to avoidance under § 547(c)(2).

Further, I hold that the bankruptcy court's conclusion that the payment reflected in check #13417 did not constitute a contemporaneous exchange of value is valid. A stated earlier, a client becomes legally obligated to pay as soon as services are rendered; if payment is received after the debt is incurred, this is payment of an antecedent debt. *See In re Balducci, supra*, at 845-46. Here, payment was of

an antecedent debt because representation by the Davis defendants commenced before they received check #13417.

The $11,858 payment can also be avoided because the Davis defendants were retained to resist the liquidation of IBI. *See SEC v. Alan F. Hughes, Inc.*, 481 F.2d 401, 102-03 (2d Cir. 1973) (court voided transfer of fees to attorneys hired to resist appointment of trustee to commence liquidation of broker-dealer). *Accord SEC v. Capital Counsellors, Inc.*, 378 F.Supp. 224, 226 (S.D. N.Y. 1974) (legal fees paid counsel to oppose application for liquidation held not payable from assets of receivership estate). In summary, check #13417 was neither a contemporaneous exchange of value under § 547(c)(1) nor properly payable from the estates of a

securities trader undergoing liquidation. Therefore, this payment constitutes an avoidable preference under § 547(b).

Payment of $25,000 to the Davis Defendants - Check #13432

The Davis defendants also challenge the bankruptcy court's conclusion that the payment of $25,000 reflected in check #13432 was voidable as a fraudulent transfer under 11 U.S.C. § 548(a)(2). (Op. at 27, R. at 328). In order for § 548(a)(2) to apply, the trustee must be establish that:

> (1) A Transfer of an interest of the debtor in property occurred;
>
> (2) The transfer occurred within one year of the bankruptcy filing;
>
> (3) The debtor received less than a reasonably equivalent value in exchange for the transfer; and
>
> (4) The debtor was insolvent on the date of the transfer.

See In re Ears, Nose & Throat Surgeons of Worcester, Inc., 49 Bankr. 316, 319 (Bankr. Mass 1985).

Here, a transfer clearly occurred within one year of the liquidation petition. I confirm the bankruptcy court's conclusion that IBI was insolvent at the time this transfer occurred. Therefore, the only remaining element is whether IBI received less than a reasonably equivalent value in exchange.

The bankruptcy court concluded that an equivalent exchange did not occur. (Op. at 25-26, R. at 326-27). This conclusion was warranted for several reasons. First, the Davis defendants failed to allow the court to pass upon the reasonableness of the attorney's fees, as intended by 11 U.S.C. § 329. Second, they failed to allow the court to

approve all legal representation, as intended by 11 U.S.C. § 327. Third, as previously stated, representation by the Davis defendants was at least in part for the benefit of individual directors of IBI, rather than IBI. Fourth, legal fees may not properly be paid from the estate to resist a liquidation petition. For these reasons, I uphold the bankruptcy court's conclusion that IBI received less than equivalent value for the $25,000 payment, and therefore conclude that check #13432 was voidable as a fraudulent transfer.

Accordingly, IT IS ORDERED that:

(1) The bankruptcy court's decision of December 10, 1985 is affirmed in part and reversed in part;

(2) The portion of the bankruptcy court's decision holding that BAFJA repeals the removal section of SIPA, 15 U.S.C. § 78eee(b)(4) is reversed;

(3) The bankruptcy court's ruling that the entire payment of $25,659.80 in check #13418 to O'Connor & Hannan fell with the exception to the trustee's avoidance power in 11 U.S.C. § 547(c)(2) is reversed;

(4) O'Connor & Hannan are entitled to retain $10,250.58 of check #13418 because this portion falls within the exception in 11 U.S.C. § 547(c)(2);

(5) O'Connor & Hannan must relinquish the remaining portion of check #13418, $15,409.22 because is constitutes a voidable preference under 11 U.S.C. § 547(b);

(6) The bankruptcy court's ruling that the payment of $11,858 to the Davis defendants in check #13417 constituted a preferential transfer under 11 U.S.C. § 547(b() is affirmed; and

(7) The bankruptcy court's ruling that the payment of $25,000.00 to the Davis defendants in check #13432 constituted a fraudulent transfer under 11 U.S.C. § 548(a)(2) is affirmed.

Each party shall bear his or its own costs.

ON MOTION TO AMEND

AND SUPPLEMENT

On October 5, 1989, this court entered an Order and Judgement ruling: (1) that the bankruptcy court has jurisdiction over the above-captioned proceeding; (2) that $15,409.22 of check #13418 paid to O'Connor and Hannan constituted a voidable preferential transfer; and (3) that the entire amount of check #13417 paid to the Davis defendants constituted a voidable preferential transfer; and (4) that the entire amount of Check #13432 paid to the Davis defendants constituted a voidable fraudulent transfer. Presently pending is the trustee's, James H. Turner ("Trustee"), motion to amend and

supplement the order and judgment pursuant to Rule 59(e), Fed.R.Civ.P.[1] O'Connor & Hannan have responded by opposing the motion.

In his motion to amend, the Trustee seeks prejudgment interest on the amounts set aside by this court pursuant to 11 U.S.C. § 547(b) and § 548(a)(2) as preferential and fraudulent transfers. The Trustee asserts that when a transfer is set aside, "the trustee is entitled to pre-judgement interest thereon from the earlier of the date on which demand is made for the return of the preference or the commencement of the adversary

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[1] Rule 59(e) provides: "[a] motion to alter or amend the judgement shall be served not later than 10 days after entry of a judgment." The Trustee complied with Rule 59(e) by filing his motion to alter or amend the judgement on Monday, October 16, 1989.

proceeding." (Trustee's motion to amend, at 2 citing *In re Baker & Getty Financial Services, Inc.*, 88 B.R. 792, 800 (Bankr. N.D. Ohio 1988); *In re Independent Clearing House Co.*, 41 B.R. 985, 1015 (Bankr. D.Utah 1984) *rev'd on other grounds*, 60 B.R. 985 (D. Utah 1986).

In opposition, O'Connor & Hannan assert that the Trustee is not "entitled" to pre-judgement interest; rather, it is allowed only within the discretion of the trial court. (O'Connor & Hannan's response, at 3 citing *In re Frigitemp Corp.*, 781 F.2d 324, 325 (2d Cir. 1986); *In re Art Shirt Ltd., Inc.*, 93 B.R. 333 (E.D. Pa. 1988); *In re Four Seasons Sporting Goods, Inc.*, 46 B.R. 528 (Bankr. N.D. Cal. 1985); *In re Roco Corp.*, 37 B.R. 770, 774 (Bankr. D.R.I. 1984). Because the bankruptcy court and this

court remained silent on the issue of prejudgment interest, O'Connor & Hannan conclude that neither court intended to award such interest. Therefore, O'Connor & Hannan seek an order denying the motion to amend and supplement the order and judgment.

In re Independent Clearing House Co, 41 B.R. 985, 1015 (Bankr. D. Utah 1984) *rev'd on other grounds*, 60 B.R. 985 (D. Utah 1986) addressed the subject of prejudgment interest. The Court there stated:

> "[t]he Bankruptcy Code itself is silent on the subject [of the availability of prejudgment interest in actions to recover preferenail and fraudulent conveyances]. However, Collier suggests that, as under prior law, the bankruptcy court should exercise its equitable powers to award the trustee interest and costs. 4 *Colliers on Bankruptcy* par. 550.02, at 550-56 (15th ed. 1984).

> Ordinarily, the allowance of prejudgment interest and the fixing of the time from which interest shall accrue are discretionary with the court.
>
> An award of prejudgment interest is not punitive but compensatory, and is allowed where necessary to make such prevailing party whole . . . .
>
> It is well settlement that in an action to set aside a preference the trustee is entitled to prejudgment interest from the date of the demand for its return, or, in the absence of a prior demand, from the date of commencement of the adversary proceeding. . . .
>
> The allowance of interest from the date demand is made or a proceeding instituted, rather than the date of the transfer, is based on the idea that until such time the preferred creditors cannot be said to hold the property wrongfully." *Id.* at 1015 (citations omitted).

In support of his contention that a trustee is entitled to prejudgment interest, the trustee cites *In re Baker &*

Getty Financial Services, Inc. 88 B.R. 792, 800 (Bankr. N.D. Ohio 1988) and *In re Independent Clearing House Co, supra* As the above quoted language reveals, these cases hold that a trustee is "entitled to prejudgment interest from the date of demand for its return, or, in the absence of a prior demand, from the date of commencement of adversary proceeding." As a threshold matter, however, the overall authority to allow such recovery is within the discretion of the trial court.

In the instant action, the bankruptcy court ruled that the transactions at issue were preferential and fraudulent only after determining that it did not have jurisdiction to decide the entire dispute. (Maj. op at 1018). That court did not address

whether the Trustee was entitled to prejudgment interest, apparently because of its determination that it lacked subject matter jurisdiction over the entire liquidation.

The cases cited by the Trustee reveal a clear trend to award prejudgment interest to a trustee who successfully overturns preferential and fraudulent transactions. This trend leads me to conclude that the bankruptcy court abused its discretion by remaining completely silent on this issue. Because the trustee was entitled to set aside the preferential and fraudulent conveyances, specified in the October 5, 1989 order, the bankruptcy court should have decided the prejudgment interest issue. I remand the case to the bankruptcy court for that decision.

Payment of $25,000 to O'Connor & Hannan - Check #13419

The Trustee also seeks an amendment to the October 5, 1989 order upholding the bankruptcy court's determination that the $25,000 payment to O'Connor & Hannan, reflected in check #13419, constituted a voidable fraudulent transfer. Because my October 5, 1989 order specifically mentioned those portions of the bankruptcy court's order that were modified, portions not mentioned were by implication upheld. Nonetheless, in the interests of clarity, I affirm the bankruptcy court's conclusion to set aside the transfer of check #13419 as a fraudulent conveyance under 11 U.S.C. § 548(a)(2).

For the reasons set forth above, the issue of whether the Trustee is entitled

to prejudgment interest on check #13419 is also remanded to the bankruptcy court.

Accordingly IT IS ORDERED that:

(1) the bankruptcy court's opinion setting aside the payment of $25,000 to O'Connor & Hannan, reflected in check #13419, as a fraudulent conveyance, is affirmed;
(2) the issue of the Trustee's entitlement to prejudgment interest on all amounts set aside is remanded to the bankruptcy court;
(3) the bankruptcy court is ordered to make specific findings as to whether the Trustee is entitled to prejudgment interest on the amounts set aside and to conduct a hearing on that issue if deemed necessary; and
(4) the bankruptcy court is also ordered to make specific findings as to whether the Trustee is entitled to costs and attorneys' fees.

Each party shall bear his or its own costs.

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF COLORADO

IN BANKRUPTCY

In re	)	
	)	
THE INVESTMENT BANKERS, INC.	)	
	)	
	)	Adversary No.
	)	82 M 87
Debtor.	)	
	)	
JAMES H. TURNER, SIPC, TRUSTEE	)	
	)	
vs.	)	
	)	
DAVIS, GILLENWATER & LYNCH and GILBERT K. DAVIS, individually and as partner of DAVIS, GILLENWATER & LYNCH, and O'CONNOR & HANNAN, a partnership	)	
	)	
Defendants.	)	

MEMORANDUM OPINION

THIS MATTER is before the court as a result of a complaint filed by the trustee for the debtor, Investment Bankers, Inc. ("IBI"), a securities

broker dealer. The complaint seeks to avoid certain payments made by IBI to Davis, Gillenwater and Lynch ("Davis, Gillenwater), to Gilbert K. Davis ("Davis") and to O'Connor and Hannan. The basis upon which the avoidance action is sought is 11 U.S.C. §§547 and 548. It is also alleged that certain payments which were made to the defendants were for services which were not approved, as required by §327, and that the requirements of §329 were not followed by the defendants. Thus, the trustee alleges all payments to defendants are subject to avoidance. Jurisdiction, as alleged in the complaint which was filed on January 19, 1982, was predicated upon 28 U.S.C. §1471 and 15 U.S.C. §78fff(b). Under §78eee(b)(4) of the Securities Investor Protection Act (SIPA), the entire liquidation proceeding was removed to this court after the trustee was appointed by the United States District Court, pursuant to an application submitted to that court under the SIPA.

Trial of this matter was commenced on August 7, 1984 and continued for a period of three days but was not completed. Thus, it was resumed in July, 1985 and was completed on July 19, 1985. I have considered the testimony presented in the trial, as well as deposition evidence and exhibits which have been submitted. The trustee interposed certain objections to deposition evidence, which objections are overruled. Thus, the designation of depositions submitted by the trustee has likewise been considered. I have also read the various briefs filed by the parties, both during and following trial, with the last such brief having been filed on August 16, 1985.

BACKGROUND

IBI, a Colorado corporation, acted as a securities broker dealer since October 23, 1980. A liquidation proceeding was commenced against the debtor (IBI) by the Securities Investor Protection Corporation (SIPC), pursuant

to authority granted to SIPC in the Securities Investor Protection Act, 15 U.S.C. §78aaa, et seq. (SIPA). The proceeding seeking liquidation of IBI was commenced on or about July 10, 1981. On July 15, 1981 the SIPA application for a liquidation order was confessed in the United States District Court for the District of Colorado, and the court appointed James H. Turner as trustee for liquidation of IBI.

On July 10, 1981, in addition to the application of SIPC for the appointment of a temporary receiver and permanent trustee to liquidate IBI, the Securities and Exchange Commission (SEC) filed a manipulation case in the United States District Court, seeking a preliminary and permanent injunction against the Company and two of its principals, Richard A. Belknap and William Gene Chandler. Belknap was the president and a director of IBI. Chandler was the office manager and a director of IBI. The injunction sought to prevent the defendants from effecting transactions or inducing the

purchase or sale of securities while IBI was in violation of "net capital" requirements provided for in the Securities Exchange Act of 1934 and Rule 17 CFR 240.15C3-1. The application for appointment of a receiver and trustee for the purpose of liquidating IBI was based upon the SIPC's determination that IBI had failed to meet its obligations to customers imposed by the SIPA and that grounds existed, specifically noncompliance with the net capital rule, for the court to issue orders for the protection of customers of IBI.

In the order of July 15, 1981 appointing Turner as trustee, the liquidation proceeding was removed to the United States Bankruptcy Court for the District of Colorado, pursuant to §5(b)(4) of SIPA, 15 U.S.C. §78eee(b)(4) (Supp. 1979). IBI consented to the order of July 15, 1981 with O'Connor and and Hannan executing the consent order as counsel for defendant IBI.

Subsequently, on July 20, 1981, the matter of the SEC's application for preliminary injunction, application for permanent injunction, and complaint on manipulation of the market came on for hearing, at which time the SEC withdrew its claim for injunctive relief against IBI in light of the appointment of a SIPC trustee and the pending liquidation of IBI. The other two defendants, Belknap and Chandler, stipulated to a court order restricting them from violating of the securities laws and from engaging in the securities business. That stipulated order was approved as to form by Gregory A. Kearns, of O'Connor and Hannan and by Gilbert K. of Davis, Davis, Gillenwater & Lynch, both of which attorneys were representing the defendants Belknap and Chandler.

After removal of the proceeding to the bankruptcy court, Turner filed a complaint seeking to avoid the transfer of four checks totaling $87,517.80 which had been executed and transferred to the defendants in this adversary proceeding

on July 10, 1981. Those four separate checks are as follows:

(a) Check #13417, dated July 10, 1981, payable to Gilbert K. Davis, Esquire, in the amount of $11,858.00;

(b) Check #13418, dated July 10, 1981, payable to O'Connor & Hannan, in the amount of $25,659.80;

(c) Check #13419, dated July 10, 1981, payable to O'Connor & Hannan Trust Account in the amount of $25,000.00;

(d) Check #13432, dated July 10, 1981, payable to Gilbert K. Davis, Esquire, of Davis, Gillenwater & Lynch, in the amount of $25,000.

FINDINGS OF FACT

The facts relevant to a resolution of the issues in this adversary proceeding are as follows:

On May 8, 1981, IBI became the principal underwriter of twenty million shares of Chipola Oil Corporation (Chipola), common stock. The stock opened on the market at ten cents per share. From that time forward, the price

rose slightly until, by about June 19, 1981, the price had been at a level of nineteen cents per share for approximately five weeks.

On June 19, 1981, the price began to rise dramatically, hitting fifty cents on June 26, 1981, sixty-five cents on June 30, 1981 and a dollar on July 1, 1981. During this period of time, there were approximately nineteen other market makers of Chipola stock. The rise in price was the result "up-ticking" by IBI and other market makers. However, the evidence is clear that IBI was the primary underwriter responsible for up-ticking.[2]

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[2]"Upticking is a process of buying stock from other broker dealers under circumstances resulting in a price escalation. Thus, as additional shares are acquired, the market in the stock is "upticked". The purpose of such a practice is to force short sellers (i.e. those who sell more stock than they have available for sale) to pay a higher price for stock necessary to cover the sales they have made. The term "cover their shorts" means to cover short sales,

(continued...)

This dramatic price escalation caused the SEC to investigate the possibility that the market was being manipulated, with the result that on July 2, 1981 the SEC delivered a letter to IBI advising that the SEC suspended trading in Chipola for a period of ten days, as of 7:45 a.m. on that date. This resulted in no further market being available for the sale of Chipola stock, with the result that its value was deemed to be zero at that point. Following the SEC investigation, IBI was admonished of the necessity to comply with the Commission's net capital rule and to notify the SEC by telegram if IBI was not in compliance. Later that same morning, IBI sent a telegram advising the SEC that IBI would cease operations until its net capital complied with Rule 13-C31 of the SEC.

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[2](...continued)
while the term "squeeze their shorts" is used to describe the process of forcing a short seller to cover.

The SEC and the NASD immediately dispatched investigators to the office of IBI to examine the books and records of the company in an effort to ascertain its true financial status. Most of this was in the presence of Gregory A. Kearns, a partner in O'Connor & Hannan, who had represented IBI since 1980.

The investigation was primarily conducted by Jackson Arthur Woodruff, Jr., an NASD examiner. His efforts revealed that, as of July 10, 1981, IBI had a negative net worth of $7,084,417.31, with total liabilities of $9,184,237.52. Thus, total assets were valued at $2,099,820.21. However, this computation was based upon valuing Chipola stock at zero.

Chipola was set at zero because trading had been suspended by the SEC on July 2, 1981, which left no ready market for the stock. According to the net capital rule, if there is no ready market for a stock, it must be valued at zero in determining compliance with the net

capital rule. Of the twenty million shares brought public, IBI had 14,663,157 shares in its inventory on July 10, 1981. On June 30, 1981, approximately nine to ten million shares were in inventory.

Valuing Chipola at zero, IBI was required to have $758,611.35 net capital on July 10, 1981. The net capital deficiency was $8,103,210.61. On this basis, it was determined that IBI would be required to place $4,423,002.44 into a special reserve account for the protection of its customers.

It is interesting to observe that all of these figures and requirements are predicated upon a system whereby the SEC can suspend trading for the investigation of a violation of the net capital rule, thus creating a situation where there is no ready market. Since there is no ready market, paragraph 15-c3-1 of the net capital rule requires that the stock be valued at zero. This, then, is of great aid to the SEC in supporting it

contention that the organization under investigation is in violation of the net capital rule. On this basis, the SEC then continues the suspension in trading until any net capital deficiencies it has declared to exist by virtue of its own creation of "no ready market" is replenished from other sources. This manipulative practice has apparently received the sanction of the courts and the Congress over the years. Aside from investigations of net capital violations, the NASD normally honors a stock's value as reflected on the firm's books.

Computations were also made by Mr. Woodruff, valuing Chipola at nineteen cents. Utilizing this valuation, as of July 10, 1981, IBI was still left with a negative net worth of $4,298,418.62. Its net capital was negative $5,451,489.05, with a net capital deficiency of $6,210,100.40.

At trial, values were also determined as of June 30, 1981. Using a valuation of Chipola at nineteen cents

per share, it was determined that, as of June 30, 1981, IBI had assets of $1,650,090.14 and liabilities of $1,316,093.30, reflecting a positive net worth of $333,936.84. This left IBI with a positive net capital of $76,884.13. However, it still left a net capital deficiency of $86,056.76. It also used the number of nine million to ten million shares in inventory, as of June 30, 1981.

Finally, computations were made at a figure of $.65625, apparently as of June 30, 1981. The closing bid price on Chipola stock on June 30, 1981 was $.65625. This reflected liabilities of $1,316,093.30, with assets of $2,506,707.95. Thus, a net worth existed in the amount of $1,190,614.65; and a positive net capital of $511,302.72.

All of Mr. Woodruff's computations involved "haircuts" (i.e., arbitrary deductions for safe, conservative figures). These haircuts varied in the amount of deductions from $109,192.79 to $366,178.13, depending upon whether

nineteen cents or $.65625 was used. The net worth figures were also manipulated by Mr. Woodruff by deducting various "nonallowable items as reflected on the books and records of the company.

Other values, involving different assumptions, were also the subject of testimony at trial. Two other expert witnesses were presented by the trustee in support of his contention that IBI was insolvent at the time the checks were negotiated to these defendants. One witness, Mr. Tom Kundinger, was a partner in the CPA firm of Peat, Marwick & Mitchell. The second was Mr. Roy Sandberg, a branch manager of Engler and Budd, a securities broker/dealer. The testimony of each of these witnesses would support the proposition that the sum of IBI's debts on July 10, 1981 was greater than the fair valuation of its property. However, it must be observed that Mr. Sandberg, for whatever reason, could not come to grips with what was meant by "market value", "true value", or "fair value." He assigned a value to

Chipola stock of $0.055, although as a trader he had paid sixty-five to seventy cents per share for it. This witness' testimony was of little help. My findings are primarily based upon the analysis conducted by Mr. Woodruff.

On July 8, 1981, Gilbert R. Davis was contacted by James Prude, a sales manager and registered representative of IBI, to represent the debtor and two of its officers, Belknap and Chandler, in matters before the SEC and in matters relating to the suspension of trading. Davis was not at any time retained to perform any work in the bankruptcy field. Davis went to Denver from Virginia, along with two other attorneys. The first was Frank Vecchio, an SEC attorney from Michigan, and the second was an attorney from Gnau, Carter & Jacobsen, a Washington political consulting firm.

A fee of $10,000 was arranged, to be divided among the three attorneys. Conferences were held on July 8 through 10, 1981. The evidence indicates the

parties and these attorneys were aware during the entire course of Davis' representation, of at least the possibility that the SEC would file a liquidation proceeding and seek injunctive relief against IBI in the United States District Court.

A retainer was agreed upon for further work, in the amount of $25,000. This fee included Davis' appearance at the hearing of July 10, 1981 on the SEC's application for injunction and the SIPC's action to liquidate IBI.

The evidence establishes that Davis received checks numbered 13417 and 13432 at about noon on July 10, 1981. These were promptly cashed into cashier's checks at the First National Bank of Denver. This transaction occurred at approximately 2:51 p.m. Davis claims to have learned of the SEC action which was to be taken that afternoon sometime subsequent to cashing these checks.

The O'Connor and Hannan checks were received at approximately 10:00 a.m. on July 10, 1984 and were cashed within one to one and one-half hours thereafter. One of the reasons these checks were taken to the bank immediately was due to the fact that O'Connor and Hannan had previously experienced an insufficient funds check from IBI. One of the checks, number 13418, was given to O'Connor and Hannan for previously rendered legal services. O'Connor and Hannan had represented IBI since 1980. IBI owed for prior legal services for the month of June 1981, as well as earlier months. Of the total amount of $25,659.80 reflected in check number 13418, the sum of $8,146.25 was attributable to legal services rendered in June of 1981, together with costs incurred in the amount of $71.30. The amount of $17,441.78 was attributable to legal services rendered in months prior to June 1981. This included $4,697.50 in legal fees, and costs of $1,879.65, in May, 1981; legal fees of $5,131.25 and costs of $874.67 in April, 1981; and legal fees

of $5,652.50, together with costs of $359.58 incurred in March, 1981. There were consistently balances due and owing on each monthly statement for several months prior to July 10, 1981. During this same period of time, IBI paid $10,000 on account in March and May, 1981. Check number 13419 was then paid to O'Connor and Hannan as a retainer "for legal services to be performed in connection with the trading suspension of Chipola" stock. These services appear to have been performed by O'Connor and Hannan from and after approximately July 1, 1981, and such time was ultimately credited against the retainer amount or was partially included in the July 10, 1981 billing.

Check number 13417 was paid to Gilbert Davis in the amount of $11,858.00. This was to cover consulting fees by Davis and others, all relating to the SEC investigation. The $25,000 check reflected in number 13432 was paid to Davis, Gillenwater and Lynch as a retainer in connection with the

suspension of Chipola stock and all other matters relating to the SEC investigation, "including involvement of NASD and/or SIPC."

At the hearing on July 10, 1981, Davis, along with O'Connor and Hannan, entered an appearance for the defendants IBI, Belknap and Chandler. That hearing resulted in the consent order, whereby IBI would not engage in any business whatsoever, other than the payment of rent, utilities and salaries of existing employees. The business to be terminated included, but was not limited to the following: "no disbursement of any funds, no transfer or disbursement of assets, no incurring of any liabilities, no transactions in securities and no settlement of any transactions."

On July 14, 1981, the SEC renewed its application for a preliminary injunction and request for the appointment of receiver. One of the grounds upon which this application was based was the issuance of the four

checks, as well as other checks, on July 10 through 13, 1981. It was contended by the SEC that the issuance of these checks was contrary to representations made by counsel for IBI at the July 10, 1981 hearing. It is clear that no evidence of those four checks was ever revealed to the SEC during the July 10, 1981 hearing or prior thereto.

Thereafter, the previously mentioned hearings of July 15, 1981 and July 20, 1981 took place.

CONCLUSIONS OF LAW

Several jurisdictional challenges have been interposed, seeking to prevent this court from exercising authority over the issues presented in this proceeding.

First, it is contended that the authority of bankruptcy judges ended on June 27, 1984, and that the retroactive provisions enacted by Congress in the bankruptcy amendments and Federal judgeship act of 1984 attempting to

continue the terms of bankruptcy judges was in controvention of Article II, §2 of the U.S. Constitution ("the Appointments Clause"). Secondly, the defendants allege that the bankruptcy amendments and Federal Judgeship Act of 1984, in enacting 28 U.S.C. §157, did not provide for the reference of matters brought under the Securities Investment Protection Act, 15 U.S.C. §78(aaa), et seq., from the U. S. District Courts to United States Bankruptcy Judges. Thirdly, defendants argue that SIPC trustees have no authority to pursue fraudulent transfers under 11 U.S.C. §548, since they have not been delegated that authority in the SIPA. Finally, it is argued that bankruptcy judges do not have jurisdiction to hear claims for preferences, In Re United Groceries of Nebraska Cooperative Inc., 46 B.R. 173 (Bankr. Neb. 1985) in support of this proposition.

I. Were the terms of bankruptcy judges constitutionally extended so as to continue to confer authority in the bankruptcy court?

The complaint in this adversary was filed on January 19, 1982. The matter came on for trial in August 1984, but was bifurcated and not completed until July 19, 1985.

The bankruptcy Amendments and Federal Judgeship Act of 1984 (BAFJA) was enacted on July 10, 1984. The transition period set forth in the bankruptcy act of 1978 was set to expire on March 31, 1984. Congress extended the transition on four separate occasions through a series of interim measures, with the final extension providing for the terms of office of bankruptcy judges to expire on June 27, 1984. P.L. 98-249, 98 stat. 116 [March 31, 1984], P.L. 98-271, 98 stat. 163 [April 30, 1984], P.L. 98-299, 98 stat. 214 [May 25, 1984], and P.L. 98325, 98 stat. 268 [June 20, 1984]. However, it must be noted that

the "holdover provisions" of §§ 404(b)(d), of the Bankruptcy Reform Act of 1978, P.L. 95-598, 92 stat. 268384 (1978) were in effect until enactment of the BAFJA of 1984. Section 404(b) provided:

> The term of a referee in bankruptcy who is serving on the date of an enactment of this [Bankruptcy Reform Act of 1978] is extended to and expires on March 31, 1984 or when his successor takes office (emphasis supplied).

The BAFJA purported to extend bankruptcy judges' terms of office from June 27, 1984 to the date of an enactment of the act, by virtue of §121(e) of that act. Then, in §106(a), it was provided as follows:

> ...the term of office of a bankruptcy judge who is serving on the date of an enactment of this Act is extended to and expires four years after the date such bankruptcy judge was last appointed to such office or on October 1, 1986, whichever is later.

The foregoing difficulties in resolving the authority and jurisdiction of bankruptcy courts has given rise to many challenges to the validity to the entire bankruptcy court system, including the contention that §121(e) attempts unconstitutionally and retroactively to create congressionally appointed bankruptcy judges in violation of the appointments clause of the Constitution of the United States, as reflected in our Article II, §2 of the Constitution.

The various courts who have considered this issue have uniformly rejected similar challenges to the authority of bankruptcy judges. In the Matter of Balwin United Corporation, 48 B.R. 49 (Bankr. S.D. Oh., W.D. 1985); In Re Tom Carter Enterprises, 44 B.R. 605 (Bankr. D.C. C.D. Cal. 1984); In Re Benny, 44 B.R. 581 (Bankr. D.C. N.D. Cal. 1984); In Re Wasatch Factory Inc., Miscellaneous B-0015W (D. Utah November 26, 1984); In Re Shearn Moody, Jr., Case No. M-84-90; B-8301490C-11 (D. Ct. Middle District N.C. 1985).

I see no reason from the arguments presented before me to deviate from the reasoned opinions set forth in these decisions. Therefore, the objection to the bankruptcy court's authority as a violation of the appointments clause of the United States Constitution is overruled.

II. Does the bankruptcy court have authority or jurisdiction to resolve disputes under the SIPA?

Defendants contend that in adopting the BAFJA of 1984, Congress neglected to provide for the referral of SIPA matters from the United States District Courts to the bankruptcy courts. This is, indeed, a troublesome contention.

As a part of the BAFJA of 1984, Congress enacted 28 U.S.C. §157 to provide a procedure for referral of bankruptcy cases and proceedings from the district courts to the bankruptcy judges for the district. Section 157 provides as follows:

> (a) Each district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district.
>
> (b)(1) Bankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11, referred under subsection (a) of this section, and may enter appropriate orders and judgments, subject to review under §158 of this title.

SIPA matters are not "cases under title 11" and are not proceedings "arising under" or "arising in or related to a case" under title 11. SIPA matters arise under the Securities Investor Protection Act, 15 U.S.C. §78aaa, et seq. It can readily be seen that the Securities Investor Protection Act is not a title 11 matter. It is a title 15 matter. Further, I can not construe title 15 matters to be "related to" title 11 cases. I know of no decisions finding

that SIPA matters are proceedings arising under, arising in or related to title 11 cases. They have customarily been referred to referees in bankruptcy, and since 1978 referred to bankruptcy judges. The bankruptcy Reform Act of 1978 made certain amendments to conform salient portions of SIPA to the Bankruptcy Code. Section §78eee (b)(4) of SIPA provides:

> (4) REMOVAL TO BANKRUPTCY COURT Upon the issuance of a protective decree and appointment of a trustee, or a trustee and counsel, under this section, the court shall forthwith order the removal of the entire liquidation proceeding to the court of the United States in the same judicial district having jurisdiction over cases under title 11. The latter court shall thereupon have all of the jurisdiction, powers, and duties conferred by this chapter upon the court to which application for the issuance of the protective decree was made.

The BAFJA of 1984 was enacted only after great debate covering a period of two years. In that act, the Congress

chose to repose jurisdiction over title 11 matters in the United States District Courts. Thus, the district court is now "the court."

There has been no legislative action to invest bankruptcy judges with any jurisdiction over SIPA matters. The reference authority set forth in 28 U.S.C. §157 and that created by virtue of general procedure order number 1984-3 in this district only refer title 11 matters to bankruptcy judges.

The SIPC concedes that a literal construction of §78eee(b)(4) of the SIPA and §157 of the BAFJA must necessarily result in depriving bankruptcy judges of any authority or jurisdiction to decide anything under a SIPA proceeding. There is simply no presently existing statutory authority for removal of a SIPA case from the district court to a bankruptcy judge. Nonetheless, the SIPC argues that Congress' clear intent has long been to require that all matters in a SIPA case be determined by the bankruptcy courts.

Citing much legislative history, the SIPC then urges that the bankruptcy court has jurisdiction under SIPA. It is further asserted that a literal interpretation of present statutes would result in an absurdity of requiring district courts to "remove" SIPA cases to themselves. "All laws are to be given a sensible construction. A literal application of a statute which would lead to absurd consequences is to be avoided whenever a reasonable application can be given which is consistent with the legislative." United States v. Ryan, 284 U.S. 167 76 L. Ed. 224, 52 S. Ct. 65. (1931).

There are several difficulties with the proposition advanced by SIPC. First, it must be observed that much of what Congress promulgated in the 1984 BAFJA results in absurdity. This is but one example. To uphold the SIPC's line of reasoning on this issue would result in conferring jurisdiction in the bankruptcy judges over title 15 matters by way of removal "to the court of United States...having jurisdiction over cases

under title 11" when bankruptcy judges do not even have jurisdiction over the cases under title 11." See, In Re Herrara, supra. This, to, is an absurd result.

Further, resorting to legislative history is only appropriate where the language of a statute is ambiguous. In Re Galvan, 39 B.R. 663 (D.C. Colo. 1984). Where the language of a statute is clear, use of committee reports, legislative comments, and the like is unnecessary. Id., at page 665. "It is presumed that when Congress drafts a statute it does so with full knowledge of the existing law;... Id., at 665. There is no ambiguity in any of the language of statutes under consideration here. Clearly, only title 11 cases and matters relating to, or arising in or out of title 11 cases may be referred to bankruptcy judges under legislation promulgated by the Congress. Had Congress desired to include title 15 matters in the legislative reference allowance, it only needed to include a sentence in 28 U.S.C. §157 so providing.

Congress had two years leading up to promulgation of the BAFJA, and it has now had an additional year since that time. No changes have been made.

I know of no authority giving the court the power to second guess what Congress might, or should have done, simply because a judge thinks it should have been so. Perhaps Congress did not want bankruptcy judges to assume responsibility of over SIPA matters, and merely failed to conform the SIPA to the 1984 BAFJA. This is at least as plausible an explanation as to assume Congress forgot to include a SIPA reference provision in BAFJA.

In the absence of legislation conferring jurisdiction on bankruptcy judges over SIPA matters or a reference from the district court authorizing bankruptcy judges to exercise the district court jurisdiction, bankruptcy judges are without authority over non-title 11 matters.

SIPC also contends that SIPA matters are really "core" proceedings arising directly out of §§327, 329, 547, and 548 of title 11. No authority is cited for this contention. I have found none. It is true the powers of a SIPA trustee include those possessed by a trustee in a case under title 11. 15 U.S.C. §78fff-1(a). These include many core matters under the bankruptcy code. However, the powers of the trustee is a separate consideration from determining what court shall exercise jurisdiction over a SIPA liquidation proceeding. Thus, I can not conclude that a SIPA liquidation proceeding under title 15 of the U.S. Code is nothing more than a core proceeding under 28 U.S.C. §157.

Based on the foregoing discussion and authority, I would conclude that bankruptcy judges are without jurisdiction or authority to rule on the matters presently before me. However, recognizing that legal analysis and authority has previously been strained and stretched to save the bankruptcy

court system where Congress has failed to act, it is possible that, on appeal, analysis by an appellate court may create authority where I have found none to exist. Therefore, I shall proceed to a resolution of other issues in the event the requisite authority is provided on appeal.

III. Does the bankruptcy court have jurisdiction or authority to resolve 11 U.S.C. §§547 or 548 matters in a SIPA proceeding?

The defendants contend that a SIPA trustee does not have authority to bring actions seeking to avoid transfers under 11 U.S.C. §§547 or 548. The primary authority upon which defendants rely on support of their §547 argument is In Re Associated Groceries of Nebraska Cooperative, Inc., supra. (Bankr. Neb. 1985). In support of their position that a SIPA trustee lacks authority to bring an action under §548, defendants point out that the purposes of a "liquidation proceeding" under SIPA are enumerated in

15 U.S.C. §78fff(a), and that these purposes do not include fraudulent transfer action sunder 11 U.S.C. §548. Defendants cite 15 U.S.C. §78 fff1(a), which provides, in part:

> A trustee shall be vested with the same powers and title with respect to the debtor and the property of the debtor, including the same rights to avoid preferences, as a trustee in a case under title 11.

As can be seen from the foregoing, no mention is made of fraudulent transfers. Thus, we are faced with another resolution of what authority Congress intended to confer.

With respect to the authority of a SIPA trustee to pursue a §547 preference action, the bankruptcy court In Re Associated Groceries of Nebraska Cooperatives, Inc., supra, held that a preference determination between the debtor and the defendant involves the

adjudication of purely private rights which, absent consent of the parties, must be tried to an Article III court under Northern Pipeline Construction Co., v. Marathon Pipeline Co., 458 U.S. 50, 102 S. Ct. 2858, 73 L.Ed. 2d 598 (1982). A motion to dismiss a preference action under §547 of the Code was granted, inspite of the clear listing of such an action as a core proceeding under 28 U. S. C. §157(b)(2)(F). It was determine that the bankruptcy court had no jurisdiction over the matter. There was no discussion of the authority of the bankruptcy court to administer the matter as a related proceeding, submitting proposed findings of fact and conclusions of law to the district court.

I know of know other decisions following In Re Associated Groceries of Nebraska Cooperatives, Inc.. I do not believe the Supreme Court of the United States intended to go that far, and I decline to follow Associated Groceries.

With respect to the authority of a SIPA trustee to pursue fraudulent transfers under 11 U.S.C. §548, there is a ample authority in support of such an action. Securities Investor Protection Corporation v. S.J. Salmon & Co. Inc., Case No. 72 Civ. 560 (S.D. N.Y. 1973); 3 Collier on Bankruptcy, paragraph 60.85 at page 1246 (14th Ed. 1977).

Such actions by SIPA trustees seeking to recover estate property routinely have been brought, both under the bankruptcy code of 1978 and the earlier bankruptcy act. See, e.g. In Re Bell & Beckwith 44 B.R. 656 (Bankr. N.D. Oh. 1984); Klein v. Tabatchnik, 418 F. Supp. 1368 (D.C. S.D. N.Y. 1976), aff'd in part and reversed in part on other grounds, 610 F. 2d 1043 (2d Cir. 1979). I can find no provisions in the BAFJA or the SIPA which would case me to feel the results should be other wise at this time. Thus, I conclude that the trustee does have authority to pursue preference actions under §547 as well as fraudulent

transfers under §548 of the Bankruptcy Code.

Other challenges to the authority of this court or the authority of the trustee I conclude to be without merit.

SUBSTANTIVE ISSUES

I. Has there been a voidable preference under 11 U.S.C. §547?

Under §547 of the Code, a preference can be avoided where there has been a transfer of property, on or within ninety days prior to filing a petition under title 11, to a creditor on an account of antecedent debt, owed by the debtor before such transfer was made, while the debtor was insolvent, which enables such creditor to receive more than he would have received had the transfer not been made. There is a presumption under §547(f) that the debtor is insolvent on and during the ninety days immediately preceding the date the petition is filed.

The liquidation petition was filed on July 10, 1981. The disputed checks were transferred and cashed on that same day, just shortly prior to filing the petition. It is the trustee's contention that check number 13418 in the amount of $25,659.80 to O'Connor and Hannan and check number 13417 in the amount of $11,858 to Davis constitute voidable preferences under §547 of the Code.

In addition to vigorously contesting the issue of insolvency, the defendants postulate certain affirmative defenses. Under these affirmative defenses, defendants argue that they fall under the exemptions provided by §547(c)(1) as a contemporaneous exchange for new value, and that the payments made to them were made in the ordinary course of business as provided in §547(c)(2).

A. Payment to O'Connor and Hannan

It is clear that the payment of $25,659.80 represented in check number 13418 to O'Connor and Hannan was for an

antecedent debt. The real disputes centers around whether the debtor was insolvent at the time the transfer was made.

In addition to the presumption of insolvency, there was ample evidence presented by the trustee indicating insolvency on July 10, 1981. I could not conclude that any amount in excess of nineteen cents could legitimately be used to determine the value of Chipola stock as of July 10, 1981. The evidence convinces me that any amount beyond nineteen cents was the result of manipulative procedures by the principals of IBI. I also conclude that valuing Chipola stock at zero is the result of manipulation by the government. Thus, such a valuation would likewise be unfair. The values which were the subject of testimony by Messrs. Sandberg and Kundinger are not persuasive.

Valuing Chipola stock at nineteen cents per share, on July 10, 1981 IBI was insolvent.

The final question to be examined, prior to reviewing the exceptions to §547, is whether the creditor received more than it would have received if the case were a case under Chapter 7, the transfer had not been made and the creditor had received payment to the extent provided by the provisions of the Code. Here it becomes necessary to examine the right of O'Connor and Hannan to receive payment on these fees in light of §329 of the Code.

The services rendered which are represented by check number 13418 were for legal services rendered prior to and not in contemplation of or in connection with the SIPA action. They were also subject to a valid attorneys' lien, as provided in C.R.S. §12-5-119 (1973). Such a lien is a statutory lien and not a judicial lien. Thus, the lien is not avoidable under 11 U.S.C. §522(f).

A creditor who receives payment on a secured claim has not been preferred simply because he realizes the value of

his collateral earlier than if he had waited until liquidation. Such payments do not deplete the debtor's estate, and thereby deprive other creditors of their rights to payment from the estate. In Re Hawkins Manufacturing Inc., 11 B.R. 512 (Bankr. Colo. 1981).

O'Connor and Hannan also contend that they fall within one of the exceptions provided in §547(c)(1) or (2). Payment is, of course, insulated from attack as a preference if the creditor establishes that he comes within one of these exceptions. In Re Auto Train Corporation, 49 B.R. 605 (D.C. 1985); In the matter of Advance Glove Manufacturing Co., 42 B.R. 489 (Bankr. Ed. Mich. S.D. 1984).

I conclude that the payment here involved does not fall within the exception of §547(c)(1) as a contemporaneous exchange for new value. The contention is made by the trustee that since trading had been suspended and IBI was doing no business on July 10,

1981, the payment could not have been made in the ordinary course of business, as contemplated in §547(c)(2).

However, the suspension in trading on July 2, 1981, did not mean that IBI could not conduct any business whatsoever, such as paying its bills and employees; nor did such suspension in trading nullify debts previously incurred by IBI and the ordinary course of business. I conclude, from the evidence before me, that the payment of check number 13418 to O'Connor and Hannan was, indeed, in payment of a debt incurred by IBI in the ordinary course of its business, was made in the ordinary course of the business and financial affairs of IBI and O'Connor and Hannan, and was made according to ordinary business terms. The fact that O'Connor and Hannan took the unusual step of immediately cashing this particular check does not detract from this result.

II. Payment to Davis of check number 13417 in the amount of $11,858

The law previously discussed as applicable to the payment to O'Connor and Hannan is likewise applicable to Davis. However, there are certain factual differences which make the result different.

The extension of credit in Davis' case was for only a few days. Nonetheless, this constituted an antecedent debt, no matter how brief the extension of credit. Engelkes v. Farmers Cooperative Co., 194 F. Supp. 319 (N.D. Iowa 1961). Services rendered were for the period of time spanning July 8, 9, and the morning of July 10, 1981.

The evidence convinces me that all of the services rendered by Davis and by Davis, Gillenwater & Lynch were in contemplation of or in connection with the SIPA case and its anticipated filing. Accordingly, §329 of the Code is applicable, and Davis has failed to

establish compliance with that section. This destroys any possible exception to avoidance under §547(c)(2). Further, most, if not all, of the representation provided by Davis and Davis, Gillenwater & Lynch was for individuals and not for IBI.

I conclude this payment is subject to avoidance as a preference.

IV. Were the transactions herein involved voidable as fraudulent conveyances under11 U.S.C. §548?

The trustee seeks to set aside and have returned to the estate the $25,000 retainer paid to O'Connor and Hannan in check number 13419 and the $25,000 retainer paid to Davis, Gillenwater & Lynch represented by check number 13432. The trustee contends that these payments constituted fraudulent transfers under 11 U.S.C. §548.

The Bankruptcy Code provides two definitions of fraudulent transfers under

§548. The first requires a showing that the transfer was made with actual intent to hinder, delay or defraud creditors. The second, an alternative definition, is that the debtor received less than a reasonably equivalent value in exchange for the transfer at a time when the debtor was insolvent or was engaged in business or about to engage in business for which any property remaining constituted an unreasonably small capitol, or intended to or believed it would incur debts beyond its ability to pay as such debts matured. The trustee primarily relies upon the second definition.

In proceedings under §548 of the Code, the burden of proof is on the trustee to establish the fraudulent conveyance. In Re Ears, Nose & Throat Surgeons of Worcester, Inc., 49 B.R. 316 (Bankr. Mass. 1985); 4 Collier on Bankruptcy, §548.10 at page 548-111, 112 (15th Ed. 1985).

To set aside a transfer under §548(a)(2), four elements must be established. It must be shown that 1) there was a transfer of an interest of the debtor and property, 2) which occurred within one year of the filing of bankruptcy, 3) that the debtor received less than a reasonably equivalent value and exchange for this transfer, and 4) that the debtor was insolvent on the date of the transfer, became insolvent as a result, or was left with an unreasonably small capitol. In Re Ear, Nose & Throat Surgeons of Worcester, Inc., supra; In the Matter of Curtina International Inc., 23 B.R. 969 (Bankr. S.D. N.Y. 1982).

Contrary to the contentions made by O'Connor and Hannan in its trial brief, there need not always be a pernicious intent, involving moral turpitude, in a fraudulent conveyance under §548. Indeed, that is not a necessary element at all under §548 (a)(2).

There is no dispute that the transfers were made to Davis, and to

O'Connor and Hannan within one year of filing the petition. I have already determined that IBI was insolvent on July 10, 1981, the date of the transfers. The question to be addressed is whether IBI received less than a reasonably equivalent value in exchange for the transfers represented by these retainer fees.

The question of reasonable equivalents should be determined in light of the function of §548, which is to achieve an equitable distribution of the debtor's property. In Re Richardson, 23 B.R. 434 (Bankr. Ut. 1982). What the debtor received in exchange for the retainers was the agreement of counsel to represent the debtor in the contemplated SIPA proceeding. There are several reasons why these payments are subject to avoidance under §548(a)(2). First, since the representation to be rendered was in contemplation of or in connection with the case which was filed that day, both O'Connor and Hannan and Davis,

Gillenwater & Lynch needed to comply with §329 of the Bankruptcy Code. This does not appear to have been done. The lack of a statement of compensation paid, is required by §329(a), impinges upon the courts ability to pass upon the reasonableness of fees in connection with representation in the liquidation proceeding. Further, no representation of the trustee is authorized except by appointment under §327 of the Bankruptcy Code. Representation of the debtor, not as a debtor-in-possession or a trustee, need not receive the sanction of the court. However, compensation of the debtor's attorney is governed by §330 of the Code if payment is to come from funds of the estate. These avenues are still available to counsel for the debtor. However, the retainers received on July 10, 1981 short circuited the aforementioned provisions. An additional reason for disgorging the fees received by way of retainer is that at least some of the services rendered thereafter were rendered for individuals. Additionally, most of the services rendered were for

the purpose of resisting the petition for a SIPC liquidation and to avoid the SECC's application for a preliminary injunction. These services are generally considered to benefit the individual principals and officers of the company. Thus, they are not compensible from the estate. Securities and Exchange Commission v. Capitol Counselors Inc., 378 F. Supp. 224 (S.D.N.Y. 1974), aff'd 512 F. 2d 654 (2d Cir. 1975); Securities and Exchange Commission v. Allen F. Hughes, Inc., 481 F. 2d 401 (2d Cir. 1973), cert. denied 414 U.S. 1092 (1973). I can not tell from the evidence what portion of the fees were attributable from individual representation and what portion would be attributable to representation of the debtor or the trustee, if such representation was authorized by the court.

I conclude that there was no reasonably equivalent value, as of July 10, 1981, given by either O'Connor and Hannan or Davis, Gillenwater & Lynch to

IBI in exchange for the two retainer checks, each in the amount of $25,000.

Based upon the foregoing discussion and authority, I conclude that the retainer checks for $25,000, represented by checks numbered 13419 and 13432 should be subject to avoidance under 11 U.S.C. §548(a)(2).

Finally, I find no merit to further affirmative defenses or counterclaims alleged by the defendants.

CONCLUSION

Based upon my conclusion that bankruptcy judges are without authority to decide SIPA matters, this matter will be and is dismissed. The remainder of this opinion shall constitute the findings and conclusions of this court in the event proper authority is found to exist in the bankruptcy court. In such event, it is my conclusion that check number 13418 in the amount of $25,659.80 payable to O'Connor and Hannan is not

subject to avoidance as a preferential transfer, and judgment shall enter in favor of O'Connor and Hannan on the claim. Check number 13417 in the amount of $11,858, payable Gilbert K. Davis, is subject to avoidance as a preferential transfer. Check number 13419 in the amount of $25,000, payable to O'Connor and Hannan is subject to avoidance as a fraudulent transfer under 11 U.S.C §548(a)(2). Check number 13432 in the amount of $25,000, payable to Davis, Gillenwater & Lynch, is subject to avoidance as a fraudulent transfer under 11 U.S.C. §548(a)(2).

IT IS SO ORDERED

DATED: DECEMBER 20, 1985.
BY THE COURT

JAY L. GUECK, Judge

Article III Section 1 of the Constitution provides:

> The judicial Power of the United States, shall be vested in one supreme Court, and such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

The Seventh Amendment to the Constitution provides:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

15 U.S.C. § 78eee(b). Protection of customers

(4) Removal to bankruptcy court. Upon the issuance of a protective decree and appointment of a trustee, or a trustee and counsel, under this section, the court shall forthwith order the

removal of the entire liquidation proceeding to the court of the United States in the same judicial district having jurisdiction over cases under title 11 (11 U.S.C. §101 et seq.). The latter court shall thereupon have all of the jurisdiction, powers, and duties conferred by this Act upon the court to which application for the issuance of the protection decree was made.

Section 115 to the Bankruptcy Amendments and Federal Judgeships Act of 1984 provides:

> Sec. 115.(a) On the date of the enactment of this Act the appropriate district court of the United States shall have jurisdiction of --

(1) cases, and matters and proceedings in cases, under the Bankruptcy Act that are pending immediately before such date in the bankruptcy courts continued by section 404(a) of the Act of November 6, 1978 (Public Law 95-598; 92 Stat. 2687), and

(2) cases under title 11 of the United States Code, and proceedings arising under title 11 of the United States Code or arising in or related to cases under title 11 of the United States Code, that are pending immediately before such date in the bankruptcy courts continued by section 404(a) of the Act of November 6, 1978 (Public Law 95-598; 92 Stat. 2687).

(b) On the date of the enactment of this Act, there shall be transferred to the appropriate district court of the United States appeals from final judgments, orders, and decrees of the bankruptcy courts pending immediately before such date in the bankruptcy appellate panels appointed under section 405(c) of the Act of November 6, 1978. (Public Law 95-598; 92 Stat. 2685)

28 U.S.C. § 157. Procedures

(a) Each district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title

11 shall be referred to the bankruptcy judges for the district.

(b)(1) Bankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11, referred under subsection (a) of this section, and may enter appropriate orders and judgments, subject to review under section 158 of this title.

(2) Core proceedings include, but are not limited to -- . . .

(F) proceedings to determine, avoid, or recover preferences; . . .

(H) proceedings to determine, avoid, or recover fraudulent conveyances; . . .

(3) The bankruptcy judge shall determine, on the judge's own motion or on timely motion of a party, whether a proceeding is a core proceeding under this subsection or is a proceeding that is otherwise related to a case under title 11. A determination that a proceeding is not a core proceeding shall be made solely on the basis that its resolution may be affected by State law.

(4) Non-core proceedings under section 157(b)(2)(B) of title 28, United States Code, shall not be subject to the mandatory abstention provision of section 1334(c)(2).

(5) The district court shall order that personal injury tort and wrongful

death claims shall be tried in the district court in which the bankruptcy case is pending, or in the district court in the district in which the claim arose, as determined by the district court in which the bankruptcy case is pending.

(c)(1) A bankruptcy judge may hear a proceeding that is not a core proceeding but that is otherwise related to a case under title 11. In such proceeding, the bankruptcy judge shall submit proposed findings of fact and conclusions of law to the district court, and any final order or judgment shall be entered by the district judge after considering the bankruptcy judge's proposed findings and conclusions and after reviewing de novo those matters to which any party has timely and specifically objected.

(2) Notwithstanding the provisions of paragraph (1) of this subsection, the district court, with the consent of all the parties to the proceeding, may refer a proceeding related to a case under title 11 to a bankruptcy judge to hear and determine and to enter appropriate orders and judgments, subject to review under section 158 of this title.

(d) The district court may withdraw, in whole or in part, any case or proceeding referred under this section, on its own motion or on timely motion of any party, for cause shown. The district court shall, on timely motion of a party, so withdraw a proceeding if the court determines that resolution of the proceeding requires consideration of both title 11 and other laws of the United States regulating

organizations or activities affecting interstate commerce.

28 U.S.C. § 1334 provides:

Bankruptcy cases and proceedings

(a) Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11.

(b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.

(c)(1) Nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11.

(2) Upon timely motion of a party in a proceeding based upon a State law claim or State law cause of action, related to a case under title 11 but not arising under title 11 or arising in a case under title 11, with respect to which an action could not have been commenced in a court of the United States absent jurisdiction under this section, the district court shall abstain from hearing such proceeding if an action is commenced, and can be timely adjudicated,

in a State forum of appropriate jurisdiction. Any decision to abstain or not to abstain made under this subsection is not reviewable by appeal or otherwise by the court of appeals under section 158(d), 1291, or 1292 of this title or by the Supreme Court of the United States under section 1254 of this title. This subsection shall not be construed to limit the applicability of the stay provided for by section 362 of title 11, United States Code, as such section applies to an action affecting the property of the estate in bankruptcy.

(d) The district court in which a case under title 11 is commenced or is pending shall have exclusive jurisdiction of all of the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate.

Bankruptcy Rule 8013 provides:

> **Disposition of Appeal; Weight Accorded Bankruptcy Judge's Findings of Fact**
>
> On an appeal the district court or bankruptcy appellate panel may affirm, modify, or reverse a bankruptcy judge's judgment, order, or decree or remand with instructions for further proceedings. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the bankruptcy court to judge the credibility of the witnesses.

11 U.S.C. § 329(a) provides:

> **Debtor's transactions with attorneys**
>
> (a) Any attorney representing a debtor in a case under this title, or in

connection with such a case, whether or not such attorney applies for compensation under this title, shall file with the court a statement of the compensation paid or agreed to be paid, if such payment or agreement was made after one year before the date of the filing of the petition, for services rendered or to be rendered in contemplation of or in connection with the case by such attorney, and the source of such compensation.

(b) If such compensation exceeds the reasonable value of any such services, the court may cancel any such agreement, or order the return of any such payment, to the extent excessive, to--

(1) the estate, if the property transferred--

(A) would have been property of the estate; or

(B) was to be paid by or on behalf of the debtor under a plan under chapter 11, 12 or 13 of this title; or

(2) the entity that made such payment.